85-541

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC.,
Petitioner,

v.

ARTHUR QUILLER, LILLIE MAE QUILLER, and
All Other Persons Similarly Situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 501(c) of the Depository Institutions Deregulation And Monetary Control Act of 1980, Pub. L. No. 96-221, Title V, § 501, 94 Stat. 161 (March 31, 1980), codified at 12 U.S.C. § 1735f-7 note [hereinafter "DIDMCA" and "the Federal Preemption Statute"], provides for federal preemption of state finance charge rate limitations otherwise applicable to mobile home financing contracts if the terms and conditions relating to the transaction comply with certain regulations, including 12 C.F.R. § 590.4(h), promulgated thereunder by the Federal Home Loan Bank Board [hereinafter the "FHLBB" and the "Board"]. This case presents the following issues:

(1) Whether the Eleventh Circuit majority's refusal to accord controlling weight to the FHLBB's interpretation of 12 C.F.R. § 590.4(h), as expressed in an opinion letter from its general counsel and in two *amicus curiae* briefs filed by the Board in this case, and to the FHLBB's conclusion that the Quillers' contract does not violate § 590.4(h) runs afoul of this Court's mandate in *Ford Motor Credit Corporation v. Milhollin*, 444 U.S. 555, 100 S.Ct. 790 (1980), that the courts should consider an agency's interpretation of its own regulations dispositive unless "demonstrably irrational"?

(2) Whether the mere presence in a manufactured home sales contract of a provision allowing acceleration or repossession after default "without notice, subject to any notice of right to cure" violates 12 C.F.R. § 590.4(h) and results in loss of federal preemption for the entire contract, where § 590.4(h) only prohibits the creditor from taking "action to repossess. . . until 30 days after the creditor sends the debtor a notice of default in the form set forth in [§ 590.4(h)(2)]," absent an allegation that any such action was actually taken by the creditor without the required notice?

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BarclaysAmerican/Credit, Inc. [hereinafter "BarclaysAmerican"], the Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the July 8, 1985, *en banc* judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

Opinions Below

The *en banc* opinion of the Court of Appeals (Appendix A)[2] is not yet reported. The panel opinion of the Court of Appeals is reported at 727 F.2d 1067 (Appendix B). There was no formal opinion of the District Court. The unre-

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1. Petitioner's parent corporations in reverse order are BarclaysAmericanCorporation, Barclays U.S. Holdings Inc., Barclays USA Inc., Barclays Bank PLC and Barclays PLC. Petitioner's successor by merger is BarclaysAmerican/Financial, Inc.

2. The Appendix to this Petition is filed as a separate document. Citations to portions of a particular appendix will be as follows: "App. ___ at ___."

ported Order of the District Court dismissing Respondent's complaint is reproduced as Appendix C.

Jurisdiction

The *en banc* opinion of the Court of Appeals was entered on July 8, 1985. This petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions And Regulations Involved

Section 501 of the Depository Institutions Deregulation And Monetary Control Act of 1980, Pub. L. No. 96-221, Title V, § 501, 94 Stat. 161 (March 31, 1980), codified at 12 U.S.C. § 1735f-7 note [hereinafter "DIDMCA" and "the Federal Preemption Statute"] and 12 C.F.R. § 590.4(h) appear in their entirety in the Appendix as Appendices G and H. The portions thereof most directly applicable to this Petition are set forth here.

DIDMCA § 501(a), 12 U.S.C. § 1735f-7 note [hereinafter "DIDMCA § ____"].

> Sec. 501. (a)(1) The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is—
>
> (A) secured by . . . a first lien on a residential manufactured home;
>
> (B) made after March 31, 1980; . . . .

DIDMCA § 501(c).

> (c) The provisions of subsection (a)(1) shall not apply to a loan, mortgage, credit sale, or advance which is secured by a first lien on a residential manufactured home unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with consumer protection provisions specified in regulations

prescribed by the Federal Home Loan Bank Board. Such regulations shall—

* * *

(2) require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances);. . . .

DIDMCA § 501(f).

(f) The Federal Home Loan Bank Board is authorized to issue rules and regulations and to publish interpretations governing the implementation of this section.

12 C.F.R. § 590.4(h) [hereinafter "§590.4(h)"].

(h) *Notice before repossession, foreclosure, or acceleration.* (1) Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. Such notice shall be sent by registered or certified mail with return receipt requested. In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as decribed above. The debtor is not entitled to notice of default more than twice in any one year period.

Statement Of The Case

On June 27, 1981, the Quillers purchased a new 1981 Liberty Mobile Home from Vintage Enterprises, Inc., pursuant to a retail installment contract [the "Quiller Contract"] (Appendix I). The Quiller Contract was subsequently assigned to BarclaysAmerican/Credit, Inc. The amount fi-

nanced under the contract was $16,000.00, the term of the contract was 180 months, the total finance charge was $31,417.40, and the annual percentage rate was 18.5%. The form contract used for the transaction indicated, in the lower left-hand corner of the front and back page thereof, that it was a "FEDERAL PREEMPTION CONTRACT."

On March 2, 1983, the Quillers filed a class action complaint (Appendix M) in the Superior Court of Richmond County, Georgia, alleging that the finance charge on the Quiller Contract exceeded the rate authorized by the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30 *et seq.* [hereinafter the "GMVSFA"] and that the overcharge was wilful. They affirmatively alleged that DIDMCA did not preempt the rate restrictions of the GMVSFA because their contract did not contain a disclosure of their right to a notice of default and a right to cure thirty days prior to any action by the creditor to accelerate, repossess or foreclose as allegedly required by 12 C.F.R. § 590.4(h) [hereinafter "the 30-day notice"]. Because of this alleged loss of preempt status, they seek, on behalf of themselves and the class members, the forfeiture of the entire finance charge and an affirmative penalty of twice the finance charge for wilful violation. O.C.G.A. § 10-1-38. As regards the Quiller Contract alone, the forfeiture would be $31,417.40 and the penalty $62,834.80, for a total loss of $94,252.20.

BarclaysAmerican removed the case to the United States District Court for the Southern District of Georgia (Augusta Division) on the basis of diversity of citizenship jurisdiction under 28 U.S.C. § 1332 and moved to dismiss under F.R.C.P. 12(b)(6) on the ground that DIDMCA preempted the GMVSFA rate provisions. On June 14, 1983, the District Judge granted the motion (Appendix C). On the same day, the District Judge also dismissed the companion case of *Grant et al. v. G.E.C.C.*, Civil Action No. CV183-96 (Appendix F) [hereinafter "*Grant*"], which involved basically the same allegations. Both the Quillers and the Grants appealed and the cases were consolidated for argument.

The Quiller Contract provides that, upon default,

> the full balance may, upon election of Holder, *without notice, subject to any notice of right to cure*, become due and payable. . . .Customer agrees in any such case to pay said amount or, at Holder's election, to deliver the Collateral to Holder, and Holder may, without notice or demand for performance or legal process, peaceably enter any premises, but not into any dwelling, where the Collateral may be found, peaceably take possession of it and custody of anything found in it.
>
> App. I at I3 (*emphasis added*).

The mobile home retail installment contract involved in *Grant* [the "Grant Contract"] contains the following provision:

> In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder. . . *provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.*
>
> App. D at D3 (*emphasis added*).

DIDMCA conditions preemption for mobile home transactions upon compliance by the creditor "with consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board." DIDMCA § 501(c). § 590.4(h) provides in pertinent part:

> Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section.
>
> 12 C.F.R. § 590.4(h).

On October 28, 1982, the FHLBB's general counsel, Thomas P. Vartanian, issued an informal opinion, 5 Fed. Banking L. Rep. ¶ 83,027 (1983) (Appendix J) [hereinafter

the "Vartanian Letter"] stating that § 590.4(h) "refers only to the act of giving notice" and does not require "that a covered credit agreement recite the purchaser-borrower's right to notice."

The FHLBB filed an *amicus curiae* brief,[3] Appendix K, before the three judge panel and adopted the views set forth in the Vartanian Letter, going on to state:

> Because plaintiff-appellants' arguments are directly inconsistent with the opinions of the Board's General Counsel and with the Board's intent, this Court should reject plaintiff-appellants' arguments and uphold the district court's dismissal of these suits on these two issues.
>
> App. K at K12.

In a 2-1 decision, Judge Kravitch, speaking first for the entire panel, held that neither DIDMCA nor § 590.4(h) requires any mention in the sales contract of the debtor's right to the 30-day notice. *Quiller et al. v. BarclaysAmerican/Credit, Inc.*, 727 F.2d 1067, 1070 (11th Cir. 1984) [hereinafter "*Quiller I*"], App. B at B5. Then, the panel split, the majority going on to hold that, since the contract contained a provision which it construed as allowing BarclaysAmerican to accelerate the indebtedness and repossess the collateral without notice, the contract "authoriz[ed] conduct *contrary* to the [preemption] statute or regulations" and therefore did not qualify for preemption. 727 F.2d at 1072, App. B at B7 (emphasis original). This conclusion was based on the newly postulated rule of construction that the court

> should examine the contract *through the eyes of the typical consumer* and determine whether the lender

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3. Other *amicae* in the appeal were: the United States League of Savings Institutions; The Consumer Bankers Association; the American Financial Services Association; the American Bankers Association; the Coordinating Counsel on Manufactured Housing Finance; the Georgia Legal Services Program, Inc.; The Housing Advocates, Inc. and the Ohio Mobile Home Owners' Network.

> could use the terms of the contract to impose illegal burdens on a debtor with no knowledge of his statutory rights.
>
> 727 F.2d at 1071, App. B at B7 (emphasis added).

Judge Roney dissented to the second holding, stating that he would simply invalidate the offending clause and enjoin its enforcement if necessary to protect the consumer. 727 F.2d at 1072-73, App. B at B9-B10. Based upon *Quiller I*, the Grant Contract was also found to have lost its preempt status, Judge Roney again dissenting. *Grant et al. v. G.E.C.C.*, 727 F.2d 1073 (11th Cir. 1984) [hereinafter "*Grant I*"], Appendix E.

The Eleventh Circuit granted rehearing *en banc* with oral argument in both cases. The FHLBB filed a second *amicus* brief, Appendix L, stating in strong terms its disagreement with the *Quiller I* and *Grant I* opinions. On July 8, 1985, the court in *Quiller* affirmed and reinstated the panel majority's opinion in a closely split (6-5) decision in which two written dissents were filed. *Quiller et al. v. BarclaysAmerican/Credit, Inc.*, ____ F.2d _____, Case No. 83-8455 (11th Cir. July 8, 1985) (*per curiam*) [hereinafter "*Quiller II*"], Appendix A. On that same day the court, in an 8-3 decision, reversed the panel majority's original decision in *Grant* and concluded that the language in the Grant Contract was sufficiently different from the language in the Quiller Contract to mandate a contrary result. *Grant et al. v. G.E.C.C.*, ____ F.2d _____, Case No. 83-8456 (11th Cir. July 8, 1985) (*per curiam*) [hereinafter "*Grant II*"], Appendix D.

REASONS FOR GRANTING THE WRIT

I. Introduction

This case is one of seven class actions brought against five different creditors involving a number of common issues of law and fact, including the principal issue involved

in this Petition[4]. The potential *ad damnum* in the pending cases is in the hundreds of millions of dollars. In *Quiller* and *Grant*, the first two of the cases to reach decision, the Eleventh Circuit has interpreted the FHLBB's regulation in a manner totally at odds with the Board's interpretation, as specifically expressed to the court in two *amicus* briefs, thus resulting in loss of federal preemption and subjecting Petitioner and other creditors to the imposition of enormous state law penalties. Two vigorous dissents revealed a sharp and fundamental philosophical split among the court's members, one of the dissenters noting his fear "that the [majority's] treatment of this preemption loan agreement forecasts an excursion into hypertechnical 'gamesmanship' similar to that apparent in litigation under the Truth-In-Lending Act" and expressing his "hope that we do not travel down that road again in connection with this very useful law." *Quiller II*, *supra*, slip op. at 4803, App. A at A8 (Hill, J., dissenting). By thus converting a regulation designed to regulate only conduct into a Truth-In-Lending type disclosure regulation, the decision below has opened the door nationwide to a flood of litigation in which the acceleration, repossession and foreclosure provisions of every DIDMCA mobile home contract will have to be examined

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4. One of the attorneys who represents Respondent in this case, John B. Long, Esq., is co-counsel for the class in each of the other six cases, which are:

Grant, *supra*;

Moyer et al. v. Citicorp Homeowners, Inc. et al, Case No. 84-8166, Eleventh Circuit Court of Appeals (on interlocutory appeal);

Fort Wayne Mortgage Company v. Wood, Case No. 85-8297, Eleventh Circuit Court of Appeals (on interlocutory appeal);

Southern Guaranty Corporation v. Doyle et al., Case No. 85-8187, Eleventh Circuit Court of Appeals (on interlocutory appeal);

Bass et al. v. Barclays American/Financial, Inc., Case No. 85 CVS 811 in the General Court of Justice, Superior Court Division of North Carolina;

Crow v. Citicorp Acceptance Co., Inc., Case No. 85 CVS 2805 in the General Court of Justice, Superior Court Division of North Carolina (on interlocutory appeal to the North Carolina Court of Appeals).

on a case-by-case basis for compliance with § 590.4(h), and it has introduced a great element of doubt in the minds of creditors as to the FHLBB's authority and ability to issue opinions and interpretations of the DIDMCA regulations upon which creditors may rely, thus making compliance with the Board's regulations problematical and highly risky for creditors.

By the late 1970's, the cost to lenders of funds had risen above the usury limits of many states, thus drying up the flow of mortgage money to the housing industry. DIDMCA was presented to Congress to counter that effect. Hearing on S. 1988 before the Comm. on Banking, Housing, and Urban Affairs, 96th Cong. 1st Sess. (1979) (Statement of Governors of the Federal Reserve System). Senator Proxmire, in presenting DIDMCA,[5] noted that usury limits had outlived their usefullness in the existing lending climate and that

> [t]he home-building industry is particularly disadvantaged by usury limits. . . The impact will be most severely felt by younger, lower-income prospective homeowners.
>
> Usury Lending Limits: Hearing on S. 1988 before the Comm. on Banking, Housing, and Urban Affairs, 96th Cong. 1st Sess. (1970) (Opening Statement of Chairman William Proxmire).

Thus DIDMCA's legislative history makes it clear that the principal and overriding purpose of § 501 of DIDMCA was to reestablish the flow of private funds back into the housing industry. The consequence of the decision below will be to frustrate, not further, that purpose.

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5. DIDMCA was only one part of an almost simultaneous three-pronged program to deregulate financing rates. Rates for Veteran's Administration transactions were deregulated by 38 U.S.C. § 1828, effective November 28, 1979, and FHA rates were deregulated by 12 U.S.C. § 1735f-7, effective December 21, 1975. The predecessor to DIDMCA, Pub. Law 96-161 (which contained a 90-day sunset provision) was effective December 28, 1979, and was replaced by DIDMCA on March 31, 1980.

As a case of first impression construing a federal statute and regulation, this case is of nationwide and immediate impact and importance to mobile home creditors affected by DIDMCA.[6] The majority opinion fails to follow recognized principles of law and is clearly in error. Even more important, the court's refusal to follow the FHLBB's interpretation of § 590.4(h) runs afoul of this Court's clear mandate that the courts should give controlling weight to an agency's interpretation of its own regulation unless "demonstrably irrational," *Ford Motor Credit Corporation v. Milhollin*, 444 U.S. 555, 100 S. Ct. 790 (1980) ["Milhollin"], and creates doubt among creditors trying to comply with the Board's regulations. That refusal, taken together with the closeness of the court's decision and the vehemence of the dissents, the amount of money involved and the potentially ruinous impact of the decision, the existence of a number of other similar pending cases, and the potential that the decision below will generate a flood of litigation nationwide (two of the other pending cases are in state court in North Carolina), make it especially appropriate that this Court grant certiorari and decide this important question of federal law at this time.[7]

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6. Manufactured housing is one of the few forms of home ownership available to low-income families. *See The Report of the President's Commission on Housing*, 1982, p. 85. Of the approximately 845,000 new manufactured homes sold nationwide during the period between 1980 and mid 1983, approximately 68% — or about 574,477 — were conventionally financed, mostly by banks, savings and loan associations and consumer finance organizations. U.S. Department of Commerce, Construction and Housing Starts Report C 20-83-6, June 1983; Appendix, p. v, to Brief of the Coordinating Council on Manufactured Housing Finance as Amicus Curiae, filed in this case. The total estimated finance charges for those manufactured homes is $13,265,690.00. *Id.*, p. ix. Even if only a relatively small percentage of that total is affected by the decision below, the impact in absolute dollar figures would be tremendous and potentially debilitating to the mobile home industry.

7. Also worthy of mention is that, if *Quiller I* is allowed to stand, the Supreme Court of North Carolina will almost certainly be put, in the very near future, in the position of choosing between the Eleventh Cir-

The issue presented is ripe for review at this time under the standards postulated by this Court in *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 200-01, 103 S. Ct. 1716, 1720 (1983). First, the issue is "[fit] for judicial decision" as it is "predominantly legal," *id.*, requiring only the construction of a short regulation. More importantly, the "hardship to the parties of withholding court consideration," *id.*, is great, as the Eleventh Circuit has refused to defer to the FHLBB's views, the monetary consequences are tremendous and Petitioner has nowhere else to turn. Finally, the comity considerations involved in supervising the balance between federal and state power under the Supremacy Clause are peculiarly appropriate for this Court's consideration, and this Court has often granted certiorari to consider decisions of the courts of appeals involving federal preemption issues, even in the absence of a conflict among the circuits. *E.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S. Ct. 1305 (1977), *reh'g denied*, 431 U.S. 925, 975 S. Ct. 2201 (1977) (certiorari granted to decide whether California food weight regulations preempted by Federal Food, Drug and Cosmetic Act); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802 (1979) (California's community property law preempted by the federal Railroad Retirement Act of 1974); *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, *supra*, (certiorari granted to decide whether Atomic Energy Act preempts § 25524.1(b) of the California Public Resources Code).

Thus, the subject matter and nature of the case, and the existence of a clear conflict between the Eleventh Circuit majority and the FHLBB as to the interpretation of § 590.4(h) make it important that such conflict be resolved by this Court at this time.

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cuit's position as expressed in *Quiller I* and the position of the Board as expressed in the Vartanian Letter and in the briefs filed by the Board.

II. The Eleventh Circuit's 6-5 Decision Is In Conflict With The Federal Home Loan Bank Board's Interpretation Of Its Own Regulation And Is Therefore In Violation Of This Court's Mandate in *Milhollin v. Ford Motor Credit Company*, 444 U.S. 555 (1980)

A. The Eleventh Circuit Majority's Position.

The sole reason alleged by Respondents to have deprived the Quiller Contract of preempt status under DIDMCA was that BarclaysAmerican violated § 590.4(h) by not disclosing in the contract the right to the 30-day notice. App. M at M3. Having unanimously rejected that allegation, the panel then split 2-1, the majority holding that

> [a]lthough federal law does not mandate a contractual notice provision, the creditor cannot obtain the benefits of preemption if the financing agreement contains express provisions authorizing conduct *contrary* to the statute or regulations. While there is no affirmative duty to disclose to the debtor his statutory right to notice before repossession or foreclosure, if the contract permits the creditor to repossess or foreclose immediately upon default, the "terms and conditions" relating to the loan agreement do not comply with regulation § 590.4(h) and the creditor cannot claim the benefits of federal preemption.
>
> *Quiller I*, App. B at B7. (emphasis original).

The court cited no federal case in point as authority for making the quantum leap necessary to construe a statute and regulation regulating only conduct to have been violated by the mere presence in a contract of a provision which arguably might authorize the proscribed conduct.

Having established its rule of law, the majority went on to set up the test by which presumably every mobile home provision in the United States would be judged:

> Because purchasers of mobile homes frequently are unaware of complicated rules of contract constuction, we should examine the contract *through the eyes of the*

> *typical consumer* and determine whether the lender could use the terms of the contract to impose illegal burdens on a debtor with no knowledge of his statutory rights.
>
> *Id.*, App. B at B7 (emphasis added).

The majority then looked at the allegedly offending contract provision and concluded that, when measured against its new-found standard, "[t]hese provisions are inaccurate statements of the creditor's rights under federal law." *Id.* at 1072, App. B at B8. With regard to the qualification, contained in the contract, that the creditor's default rights were "subject to any notice of right to cure," the majority responded that "[u]nless the debtor has acquired knowledge of his statutory right to cure from some outside source, however, this language will not accurately notify him of his contractual rights." *Id.*, App. B at B8. In its perhaps most startling statement of all, the majority went on to say that the "subject to" qualification would at most inform the debtor that he might have a right of cure, "but the law guarantees him an *absolute* right to cure," *id.*, App. B at B8 (emphasis original), thus resulting in the consumer having been given "an affirmative misrepresentation as to his statutory guarantees."

Finally, in response to BarclaysAmerican's argument that § 590.4(h) could not possibly be violated without some action having been taken to accelerate, foreclose or repossess without proper notice, the majority stated:

> But when the contract affirmatively allows the creditor to foreclose, repossess or accelerate payment immediately upon default, subject to an undefined, potential right to cure, the "terms and conditions" relating to the loan agreement do not comply with the regulations or the statute. . . [and] the Quiller contract does not qualify for protection under the preemption statute.
>
> *Id.*, App. B at B9.

As has already been noted, a 6-5 majority of the *en banc* court, *per curiam*, reaffirmed and reinstated the panel opinion upon rehearing without further substantive comment.

B. The Federal Home Loan Bank Board's Contrary Position, As Expressed To The Eleventh Circuit In *Quiller*.

The Vartanian Letter specifically stated that "[t]his requirement [of § 590.4(h)] refers only to the act of giving notice." On rehearing *en banc*, the Board filed a second *amicus* brief, stating:

> The Board has an interest in this litigation because it is authorized under the Act to publish interpretations governing its implementation, 12 U.S.C. § 1735f-7 note(f), and because the Board desires that judicial construction of Board regulations be consistent with the agency's intent in adopting the regulations. *This is of particular importance in these cases where the panel has written opinions that, while purporting to defer to the Board's interpretation of its regulations, reach a result that is not consonant with the statute or regulations.*
>
> App. L at L8-L9 (emphasis added).

The Board disagreed with the panel majority's position in the second part of *Quiller I* that the rights of immediate acceleration and default contained in the contract violated § 590.4(h), saying that those rights were "not necessarily contrary to the Act and the implementing regulation" because both DIDMCA and § 590.4(h) specifically provide for "circumstances in which a creditor may in fact accelerate, repossess or foreclose without giving the 30-day notice: (1) abandonment; (2) other extreme circumstances; and (3) upon the debtor's third default in a one-year period." App. L at L13-L14. The Board went on to note that the Quiller Contract did not in any event claim an "unqualified right to immediate acceleration, repossession and foreclosure without notice," those rights specifically being "subject to any notice of right to cure," concluding:

> Therefore, the contracts do not controvert the protections of the Act.

App. L at L14.

The Board then stated that the panel majority's "typical consumer" standard of contract construction

> would harm the goals of the Congress in adopting the Act. Preemption was plainly thought essential to assure the availability of financing to relatively low-income mobile home buyers. The penalties for usury are often severe. *The "average consumer" test would create great uncertainty among lenders. It would be impossible to know whether particular contract language might be considered too vague or inconsistent with the Act by a particular jury or trial court. Therefore, Borrowers' proposed standard, if adopted by this Court, could seriously reduce the availability of financing to low-income borrowers. This result would be particularly unfair because the Board's guidance to lenders has been that such contractual disclosures are not required.*

App. L at L15-L16 (emphasis added).

The Board felt that the notice requirement was simply in the nature of a condition precedent to the right to exercise default remedies,[8] and went on to say:

> Moreover, such a draconian result is not required to achieve Congress' other goal — providing certain protections to debtors under the Act. Regardless of contract language, a lender cannot qualify for usury pre-

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8. Georgia law contains a number of examples of analagous statutory conditions precedent. *E.g.*, O.C.G.A. § 44-14-162.2 (15-day notice required prior to a real property foreclosure sale); O.C.G.A. § 13-4-4 (where parties mutually disregard contract, reasonable notice required before original provisions of contract enforceable). Not giving the requisite notice does not, however, invalidate the contract, but simply invalidates the action taken (repossession, foreclosure, etc.) or subjects the wrongdoer to tort damages.

> emption it it does not *in fact* provide to borrowers the rights required by the Act.
>
> App. L at L15-16 (emphasis original).

The Board then stated:

> The regulation prescribes the *act* of giving notice and the form the notice must take. This is a significant right of debtors that must be observed for the federal usury preemption to continue to apply.
>
> . . . If, in fact, a court finds that the prescribed notice under section 501.4(h) was not provided to the debtor, then the creditor loses its federal preemption of the state usury law. The debtor then has available the full panoply of rights and remedies under the applicable usury statute.
>
> App. L at L16 (emphasis original) (footnote omitted).

The Board concluded:

> The Board's interpretations of its regulations, 12 C.F.R. § 590.4(d) and (h) are correct and in accord with Congressional intent concerning their applicability to the contracts at issue in these cases. The interpretations are not "demonstrably irrational" and are to be dispositive of the issues concerning whether the contracts qualify on their face for federal preemption under the Act. *The central issue for this Court to resolve is whether Borrowers have properly pleaded a failure by GECC or Barclays to in fact provide them the notices required by the Act and regulation.*
>
> App. L at L16-L17 (emphasis partially original, partially added).

The *en banc* dissenters agreed. *Quiller II*, slip op. 4799-4803, App. A at A2-A5 (Roney, J., dissenting).

C. The Federal Home Loan Bank Board's Position Was Not "Demonstrably Irrational" — *Milhollin* Requires Reversal.

The FHLBB is the agency designated by the Congress to promulgate the regulations specified in Section 501(c) of DIDMCA. DIDMCA § 501(d), App. G at G5. Furthermore, the FHLBB is "authorized to issue rules and regulations and to publish interpretations governing the implementation of [DIDMCA]." DIDMCA § 501(f), App. G at G6.

The position of the Board and of the dissenters is first that the Quiller Contract did not unequivocally give BarclaysAmerican a right which in all instances would result in conduct proscribed by DIDMCA and § 590.4(h) — thus, it did not violate the regulation and hence DIDMCA. They then argue that DIDMCA and the regulation regulate only the *act* of giving notice, and it is only a failure *in fact* to give that notice which results in loss of preemption.

This Court has often held that "an agency's interpretation of its own regulations is of 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see [*Milhollin, supra*, 444 U.S. at 566]; *United Staes v. Larionoff*, 431 U.S. 864, 872 (1977)." *Jean, et al. v. Nelson, Comm'r, et al*, 53 U.S.L.W. 4892, 4897 (U.S. June 25, 1985) (No. 84-5240). In 1980 this Court, in *Milhollin, supra*, dealt very specifically with the weight to be accorded the Federal Reserve Board's ["FRB"] interpretation of the consumer credit protection regulations, Regulation Z, 12 C.F.R. § 226.1 *et seq.*, it had promulgated under the Truth-In-Lending Act ["TILA"], 15 U.S.C. § 1601 *et seq.* In reaching the conclusion "that the Court of Appeals erred in rejecting the views of the Federal Reserve Board and staff" interpreting Regulation 2, as expressed in an FRB staff memorandum, this Court formulated the following rule:

> *Unless demonstrably irrational,* Federal Reserve Board staff opinions construing the Act or Regulation *should be dispositive. . . .*

> *Milhollin, supra*, 444 U.S. at 565, 100 S. Ct. at 797 (emphasis added).

This was especially so where Congress had authorized the agency to interpret the regulations. *Id.* This Court admonished the courts that "*judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational.*" *Id.* at 568, 100 S. Ct. at 798 (emphasis added). As regards consumer disclosures, the rationale for the rule is that

> [t]he concept of "meaningful disclosure" that animates TILA . . . cannot be applied in the abstract. *Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between "competing considerations of complete disclosure. . . and the need to avoid. . . [informational overload.]" . . . And striking the appropriate balance is an empirical process that entails investigation into consumer psychology and that presupposes broad experience with credit practices. Administrative agencies are simply better suited than courts to engage in such a process.
> 444 U.S. at 568-70, 100 S. Ct. at 798. (citations omitted)(footnote omitted)(emphasis original).

The foregoing observations of this Court apply without alteration to the instant case. Here, as there, the agency whose views are at issue is the agency appointed by Congress both to promulgate and to interpret the regulation under scrutiny. Here, as there, the agency has spoken unequivocally and has pronounced that Section 590.4(h) regulates only the acts of exercising default remedies without giving the required notice, and that nothing contained in the contract can violate the regulation. And here, as there, the Court of Appeals rejected the agency's interpretation of its own regulation. This Court reversed the Court of Appeals in *Milhollin*, and it should in this case because the Board's interpretation is not "demonstrably irrational."

Under § 590.4(h), there are four sets of circumstances under which default may occur: (1) abandonment; (2) other extreme circumstances; (3) where the debtor has been sent notice of default twice within the prior one-year period; and (4) all other situations. The majority's statement that the debtor's right to the 30-day notice is "absolute" is clearly erroneous. As the Board and its general counsel stated, only in the latter one of the four situations is the 30-day notice required. Thus, it is not "demonstrably irrational" to say, as did the Board (App. L at L14), that BarclaysAmerican's contractual right to immediate exercise of its default remedies did not necessarily violate the regulation, and that the right was in fact contractually qualified by the borrower's right to the 30-day notice.

Furthermore, a reading of § 590.4(h) reveals that the regulation requires only that the 30-day notice *actually be given* 30 days before any *action* is taken to accelerate, repossess or foreclose. Thus, the Board's interpretation of § 590.4(h) as regulating only the *act* of giving notice (App. L at L16), and not as regulating the contents of any contract, is similarly not "demonstrably irrational."

The transformation of § 590.4(h) into a "disclosure" regulation is the kind of "interstitial lawmaking" which *Milhollin* sought to discourage. The message of *Milhollin* was that the courts should not second-guess agency determinations in these situations. That message was lost upon the Eleventh Circuit majority, which paid lip-service to *Milhollin* and then reached a contrary result. This Court should retransmit the message loudly and clearly to avert a repetition of the TILA litigation of the '70s.[9]

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9. The *Milhollin* rule should apply with even greater force here. In *Milhollin*, the penalty sought was $1,000 plus attorneys' fees, as compared with the $94,000 sought only by the Quillers, let alone the class members. Furthermore, the TILA had a carefully thought-out remedial scheme with very limited recoveries, a one year statute of limitations and several exculpatory provisions, whereas under DIDMCA the recoveries are alleged to be virtually unlimited.

III. The Decision Below Is In Conflict With The Clear Language Of DIDMCA And 12 C.F.R. § 590.4(h) And Fails To Adhere To The General Rule, Followed In The Federal Courts, That A Contract Provision Authorizing Conduct Proscribed By A Statute Does Not Constitute A Violation Of The Statute Absent Action To Enforce The Provision.

A. 12 C.F.R. § 590.4(h) Regulates Only The Act Of Giving The 30-day Notice; Therefore, The Language Of The Quiller Contract Did Not Per Se Violate The Regulation.

DIDMCA § 501(c) conditions preemptive status upon compliance with the FHLBB regulations promulgated pursuant thereto. Since the advent of the "age of consumerism" in the sixties, *see generally Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652 (1973), state and federal statutes have imposed upon creditors many different requirements aimed at the protection of consumers. In general, such requirements may be divided into three broad categories: (1) "contract for" items which will not be enforced unless specifically agreed to in writing by the consumer; (2) "disclosure" items which must be disclosed to the consumer, either in the contract or on a separate disclosure statement; and (3) "conduct" or "action" items which simply require some action on the part of the creditor, irrespective of the terms of the contact. A review of the FHLBB's mobile home regulations, 12 C.F.R. § 590.4, shows that the FHLBB used all three approaches in the DIDMCA regulations. There are "contract for" requirements, 12 C.F.R. §§ 590.4(e)(3), (f)(1) & (g)(1), "disclosure" requirements, 12 C.F.R. § 590.4(d), and "action" or "conduct" requirements, 12 C.F.R § 590.4(c) & (h).

The majority in *Quiller I* seemed to agree that § 590.4(h) was a "conduct" regulation, quoting with approval the statement of the Board's general counsel to the effect that " '[§ 590.4(h)] refers only to the act of giving notice.' " A plain reading of the statute in light of the general counsel's statement leads to the following analysis:

(1) § 590.4(h) forbids *action* to accelerate, repossess or foreclose prior to creditor's *action* in giving timely and proper notice
(2) therefore, if creditor takes *action* to repossess or foreclose without giving proper notice
(3) regulation has been violated.

Viewed against that background, the fundamental error in the decision below becomes obvious from a reading of the preamble to the majority's second holding in *Quiller I*:

> . . . [I]f the contract permits the creditor to repossess or foreclose immediately upon default, the "terms and conditions" relating to the loan agreement do not comply with regulation § 590.4(h) and the creditor cannot claim the benefits of federal preemption.
>
> *Quiller I*, 727 F.2d at 1071, App. B at B7.

That statement reflects an analysis of § 590.4(h) which results in a total non-sequitur and is wrong:

(1) § 590.4(h) forbids *action* to accelerate, repossess or foreclose prior to creditor's *action* in giving timely and proper notice
(2) therefore, if contract contains term *arguendo allowing action* to repossess or foreclose without giving proper notice
(3) regulation has been violated even if creditor has not acted in manner prohibited by regulation.

Since the regulation does not forbid a contract term allowing the proscribed *conduct*, such a contract term cannot possibly "violate" the regulation. To "create" such a "violation" constitutes the kind of "interstitial lawmaking" forbidden by *Milhollin*. As the FHLBB said in its second *amicus* brief, the only real issue "is whether [there has been] a failure by GECC or Barclays to *in fact* provide [the Quillers] the notices required by the Act and regulation." App. L at L17 (emphasis original). As only a violation of the *regulation* could result in loss of preemption, the Quiller Contract retains its preempt status, and as the complaint did not plead any actual attempts at acceleration, repossession

or foreclosure without giving the required notice, the trial judge correctly dismissed the complaint. F.R.C.P. 12(b)(6).

B. A Contractual Provision Authorizing A Statutorily Prohibited Act Does Not In And Of Itself Violate The Statute Absent A Statutory Proscription Against The Contract Provision Itself.

The majority did not cite a single case, either federal or state, in which a contract provision which, if enforced according to its terms, would result in conduct violative of a statute or regulation was held to violate a statute or regulation that regulated only conduct. In fact, the general rule, and that applied by the federal courts, is that, in such an instance, the offending clause is simply not enforceable, but the court will enforce the remainder of the contract as written.[10] For example, in *Vineberg v. Brunswick Corp.*, 391 F.2d 184 (5th Cir. 1968), cited by Judge Roney in his dissent in *Quiller II*, the defendants were sued on two identical notes which contained confession of judgment clauses which were void under Fla. Stat. § 55.05, defended on the ground that the cognovit clauses rendered the notes void in their entirety, even absent any attempt to enforce the clauses. The Fifth Circuit held that the cognovit clauses themselves were void but severable because of

> the well known principle of contract law that an illegal contract provision, or one contrary to public policy,

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10. Georgia law is the same. *Porter v. Midland-Guardian Co.*, 145 Ga. App. 262, 243 S.E.2d 595, *rev'd on other grounds*, 242 Ga. 1, 247 S.E.2d 743 (1978) (acceleration clause which, if enforced, would result in charging of excess rates does not violate a consumer finance statute that merely forbids charging excess rates, unless the creditor enforces the invalid provision); *Lowe v. Termplan, Inc.*, 144 Ga. App. 671, 242 S.E.2d 268 (1978) (invalid contract clause waiving right to notice of collateral sale does not invalidate the contract in absence of enforcement of the invalid clause). *But cf. Lawrimore v. Sun Finance Co.*, 131 Ga. App. 96, 205 S.E.2d 110, *aff'd*, 232 Ga. 637, 208 S.E.2d 454 (1974) (acceleration clause which, if enforced, would result in charging of excess rates violates statute that expressly forbids "contracting for" excess charges).

> when invalidated, will be severed from the remainder of the contract if it is possible to do so without leaving the remainder of the contract meaningless.

391 F.2d 186 (citations omitted).

Similarly, in *Seaboard Surety Co. v. Harbison*, 304 F.2d 247 (7th Cir. 1962), plaintiff surety company sued to enforce a series of indemnity agreements. Defendants pleaded the affirmative defense of "illegality" because each indemnity agreement contained a cognovit provision which was unlawful and unenforceable under Ind. Ann. Stat. § 2-2904 (Burns 1946). The Seventh Circuit struck the defense, finding the cognovit clauses themselves invalid, but not the remainder of the contract. *Id.*, 304 F.2d at 250.

This Court has followed the same approach in the antitrust context. One of the most-cited cases seems to be *Kelly v. Kosuga*, 358 U.S. 516, 79 S. Ct. 429 (1959), in which an onion grower was sued for the unpaid purchase price of onions he had purchased from respondent. The purchaser defended on the ground that his contract with respondent included a price fixing provision which violated the Sherman Act and voided the entire contract, including his promise to pay for the onions. This Court rejected that defense, stating that, "while the nondelivery agreement between the parties could not be enforced by a court," the lawful sale of the onions constituted "an intelligible economic transaction in itself" which the Court would "give . . . effect even though it furnished the occasion for a restrictive agreement of the sort here in question." *Id.*, 358 U.S. at 521, 79 S. Ct. at 432. The *Kosuga* approach has been applied by this Court many times, as shown by the numerous cases cited in *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1059 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105, 103 S. Ct. 729.

In the instant case, there has been alleged no effort on the part of BarclaysAmerican to enforce the provision of the contract which allegedly violates § 590.4(h). Under this Court's ruling in *Kosuga* and the other authorities referred to above, the remainder of the contract would remain en-

forceable under DIDMCA until such an attempt occurred, and the trial judge correctly dismissed the complaint.

C. The Dissenters' Approach — Simply Invalidating The Contract Provision — Best Effectuates The Congressional Purpose Of DIDMCA While Affording The Consumers The Protections To Which They Are Entitled.

The rule espoused by the dissenters is succinctly summed up by Judge Roney's statement in his first dissent in *Quiller I* that

> [r]ather than applying state usery [sic] laws to a contract which could not have been validly made thereunder, it would be more equitable to simply invalidate this contract clause to the extent it violates the consumer regulations, and enjoin enforcement if that remedy is deemed necessary to protect the consumer.
>
> *Quiller I*, 727 F.2d at 1072, App. B at B10 (Roney, J., dissenting).

Judge Roney expanded upon that theme in his *en banc* dissent, relying on the severability rule in *Vineberg*, *supra*, quoted in the preceeding section, and stating:

> The provisions of the contract held to be contrary to federal regulations certainly could be severed from the contract before us without rendering it meaningless. . . .
>
> *Quiller II*, slip op. at 4802, App. A at A6-A7.

That approach would afford consumers the protections contemplated by DIDMCA. It would also further the main purpose of Congress in enacting DIDMCA, which Judge Hill described in his dissent in *Quiller II* as follows:

> In passing the preemption act, Congress constructively undertook to ease the severity of the mortgage credit crunch and insure the availability of mortgage credit in states [with artificially low statutory interest levels]. (*citation omitted*) Although Congress concluded that purchasers of financing for premanufactured homes

> were entitled to additional consumer protections in order for their mortgages to fall within the preemption act, there is no doubt that the overriding objective of the act was to assist both borrowers and lenders by freeing up additional credit for housing. This was not intended to be a consumer protection disclosure act.

Id., slip op. at 4803, App. A at A8 (Hill, J., dissenting).

As proper and timely notice in accordance with § 590.4(h) would, irrespective of the terms of any contract, be a condition precedent to acceleration, repossession or foreclosure,

> [a] borrower can be adequately protected from actual violations of the act when and if they occur, at which time a counter-claim along the lines of the present action might be entertained.[11]

Id., App. A at A9.

It is totally unnecessary, either in terms of consumer protection or in terms of achieving the "overriding [congressional] objective" of DIDMCA, to subject creditors to the enormous penalties threatened by this lawsuit and others of its ilk. The clear requirements of DIDMCA and § 590.4(h), together with the ability of the state and federal courts to afford relief for *actual* violations, will protect consumers while insuring the continued steady flow of private venture capital into the mobile home financing sector.

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11. The Georgia courts have allowed recovery in tort for wrongful foreclosure and wrongful repossession. *Curl v. First Federal Savings and Loan Association of Gainesville*, 243 Ga. 842, 257 S.E.2d 264 (1979)(foreclosure); *Ford Motor Credit Co. v. Hunt*, 141 Ga. App. 612, 234 S.E.2d 112 (1977)(repossession).

IV. The Decision Below Brings Into Question The Preempt Status Of Every DIDMCA Mobile Home Contract Entered Into Since March 31, 1980, And Subjects Creditors To Billions Of Dollars Of Potential Liability For State Law Penalties Not Contemplated At The Time Of Contracting.

A. The Confusion Created By *Grant II*, *Quiller I* And The "Typical Consumer" Rule Of Disclosure/Construction.

Virtually every retail installment contract written in recent decades contains an acceleration clause and many, if not most, refer in some way to the creditor's rights upon default to repossess or foreclose. Immediacy is the very essence of acceleration, as has traditionally been the lack of necessity for notice and demand, since a creditor who has not received timely repayment needs to take immediate steps to protect itself. Similarily, U.C.C. § 9-503 allows repossession without "breach of the peace" and poses no notice or demand requirements. That is particularly important where the collateral is mobile and the giving of notice might actually act to defeat the right asserted.

Traditionally, acceleration and repossession provisions have not been drafted for the understanding of the "typical consumer." In fact, in a 1977 consumer credit survey conducted by the Federal Reserve Board, acceleration did not even make the list of the seventeen most important credit items in the eyes of consumers. 1978 FRB Report To Congress On Truth-In-Lending at 24. The Board has stated in this case, and the first part of *Quiller I* held, that § 590.4(h) does not require disclosure of the debtor's right to notice prior to acceleration or repossession. Why, then, require that acceleration or repossession clauses be drafted in such a way that the "typical consumer" will understand completely his or her complicated right to a 30-day notice? The mobile home consumer already gets the disclosures required by the TILA and Regulation Z and the Federal Trade Commission Holder in Due Course disclosure, 16 C.F.R. § 433.2(a), in addition to a considerable number of disclo-

sures mandated by state law. *E.g.*, GMVSFA, O.C.G.A. § 10-1-32. Presumably the FHLBB was aware of the amount of information presented to mobile home consumers and simply made an informed decision not to require disclosures regarding acceleration and repossession in order to avoid the type of "informational overload" referred to by this Court in *Milhollin*.

And what will be a sufficient "disclosure" under *Quiller I* and *Grant II*? The traditional acceleration clause has read something like this:

> Upon default by the purchaser, seller shall have the right, without notice or demand, to declare immediately due and payable all installments remaining due hereunder, giving such rebates as are required by law.

Now, however, in order to comply with *Quiller I* and *Grant II* and still retain its rights of acceleration and repossession, a creditor presumably would have to rephrase its acceleration clause somewhat as follows:

> Upon default by the purchaser, seller shall have the right to declare all installments remaining unpaid due and payable 30 days after it sends to the purchaser a notice of default and right to cure in the form set forth in 12 C.F.R. § 590.4(h)(2), unless the purchaser has abandoned the mobile home, or unless there is some other extreme circumstance, or unless purchaser has been sent such a notice two other times within the preceeding one year period.

When are the limits of "informational overload" reached? If "disclosure" is important, query whether or not consumers will get any more out of this acceleration clause than out of the more traditional one? The sentence is long and complex. What does "abandoned" mean? What is "some other extreme circumstance"? What is the form of the notice set forth in § 590.4(h) — must the entire form of the notice be set forth in full in the contract?

The Board did not require such disclosure and DIDMCA contracts entered into since March 31, 1980, will, as a mat-

ter of fact, not have been drafted with the "typical consumer" in mind. Nonetheless, all of those contracts will, under *Quiller I* and *Grant II*, have to be examined on a case-by-case basis and all of those which are in the traditional form will surely fail the test. Can anyone really say that either DIDMCA or § 590.4(h) gave even the most prudent creditor notice, five years ago, that this would be the result?

Perhaps even more important, what guidance do creditors have to assist them in compliance? *Quiller I* rejected the FHLBB's views on compliance with § 590.4(h) but substituted no practical guidance of its own. Other circuit courts and all state courts faced with this issue will now be forced to choose between the Eleventh Circuit's approach and that of the Board. It was exactly this dilemma which *Milhollin* sought to resolve, and this Court should do so now.

B. The Potential Detrimental Consequences Of Loss Of Preemption.

1. To consumers.

The principal purpose of DIDMCA's mobile home provision was to infuse money back into the failing mobile home market and make this type of low-income housing once again available to consumers, not to provide a windfall to consumers who had never been harmed by any alleged hypertechnical contract violations. The cost of the litigation over these issues will ultimately be borne by the consumers in the form of higher rates, and this is more so than ever before because of the universal trend (of which DIDMCA is a part) to deregulate financing rates. An even more important consequence of turning DIDMCA and its regulations into another TILA and Regulation Z will simply be, as noted by the Board in its second *amicus* brief, to cut down the flow of money to the mobile home market, which will be accompanied by a raising of credit-granting standards resulting in adverse credit decisions for those at the lower end of the credit-worthiness spectrum — typically those in the

most need of this type of housing. The irony of the situation is that this will be exactly the opposite of the principal objective Congress hoped to achieve in enacting this "carefully conceived financing program established to meet the needs of *both* parties in a time of rising cost of money." *Quiller I*, 727 F.2d at 1072, App. B at B10 (Roney, J., dissenting) *Cf.*, *Quiller II*, slip op. at 4803, App. A at A-9 (Hill, J., dissenting).

2. To creditors.

Creditors simply have not planned for and are not prepared for the consequences of the *Quiller I* decision. Many acceleration and repossession provisions, especially those expressed in the traditional form, will surely run afoul of *Quiller I* and, when that occurs, there will be a usury violation in a high percentage of the cases, since the very purpose of using DIDMCA in the first place was to be able to charge a rate greater than that allowed by state law. The monetary consequences to creditors will then be horrendous. Using *Quiller* as an example, the original credit extension was in the amount of $16,000, yet the Quillers seek $94,252.20 in forfeitures and penalties for themselves alone.

In North Carolina, where *Bass* and *Crow*, *supra* n. 6, are pending, the North Carolina Retail Installment Sales Act, N.C. Gen. Stat. § 25A-1 *et seq.*, provides penalties of forfeiture of the finance charge and affirmative recovery of twice the finance charge paid in cases analogous to *Quiller*. In addition, the consumers in those cases also allege that the rate violation "created" by the "*Quiller* violation" is also a violation of North Carolina's unfair trade practices laws, which would result in a further *trebling* of the damages awarded under the retail installment act. Applied to the Quiller Contract, that would result in the most extreme case in damages of $188,504.40. In the class action context, the potential damages in these situations are absolutely mind boggling. Surely the Congress never had that result in mind in enacting this statute, the primary purpose of which was to lure creditors back into the mobile home financing sec-

tor. This Court should put an end to this type of litigation now.

V. Conclusion

Under *Milhollin*, the FHLBB's view that 12 C.F.R. § 590.4(h) regulates only the act of giving the 30-day notice and does not attempt to regulate the contents of a mobile home sales contract with respect to that notice should have been accorded controlling weight by the Eleventh Circuit. The Board found that the language in the Quiller Contract did not violate § 590.4(h), but even if it did, the rule followed by other circuits which have considered the issue in analogous contexts is that the offending contract provision itself is simply invalidated, absent an actual attempt to enforce it. Finally, the decision below defeats the obvious intent of DIDMCA in imposing enormous unforeseen penalties upon unwary creditors and thereby lessening the flow of credit into, and raising the price of credit in, a sector of the housing market where credit is the *sine qua non* of the availability of housing. The issues in this case are of an importance far beyond this particular case, given the number of other cases presently pending involving the same issues and the strong likelihood that state and federal courts thoughout the country will be required to engage in *Quiller/Grant* analysis of mobile home contracts entered into under DIDMCA since 1980. These issues are now ripe for consideration by this Court and Petitioner respectfully requests that a Writ of Certiorari issue to review the July 8, 1985, opinion of the Eleventh Circuit.

Respectfully submitted,
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Dated: September 27, 1985

85-541

No.

Supreme Court, U.S.
FILED
SEP 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC.,
Petitioner,

v.

ARTHUR QUILLER, LILLIE MAE QUILLER, and
All Other Persons Similarly Situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 83-8455

Arthur QUILLER,
Lillie Mae Quiller,
and all other persons
similarly situated,

Plaintiffs-Appellants,

v.

BARCLAYSAMERICAN/
CREDIT, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

Decided: July 8, 1985.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, and ANDERSON, Circuit Judges.*

PER CURIAM:

Arthur and Lillie Mae Quiller filed a class action against BarclaysAmerican/Credit, Inc., in the Superior Court of Richmond County, Georgia, alleging a violation of the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. §§ 10-1-30 to -38 (Michie 1982). After removing the case to the United States District Court for the Southern District of Georgia, Barclays moved to dismiss for failure to state a claim, contending *inter alia* that the action was precluded by the De-

* Judge Thomas A. Clark, recused himself and did not participate in this decision.

pository Institutions Deregulation and Monetary Control Act, Pub.L. No. 96-221, Title V, § 501, 94 Stat. 161 (1980) (codified at 12 U.S.C. § 1735f-7 note). The district court granted Barclays' motion to dismiss, but a panel of this court reversed the order of dismissal and remanded the case for further proceedings. *Quiller v. BarclaysAmerican/ Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1984).

On rehearing *en banc*, we agree with the panel's disposition of the case. We therefore affirm and reinstate the panel opinion. The district court's order granting Barclays' motion to dismiss is REVERSED, and the case is REMANDED for further proceedings.

RONEY, Circuit Judge, dissenting, with whom TJOFLAT, JAMES C. HILL, FAY and R. LANIER ANDERSON, III, Circuit Judges, join:

The Court holds *first* that the contract is expressly contrary to the federal statute and regulations comprising the federal preemption scheme because it permits the creditor to foreclose, repossess, or accelerate upon the debtor's default "without notice" and *second*, that the plantiff is entitled to the remedies available under Georgia usury law. I dissent from both of these decisions. Although not a model of clarity, the contract is not necessarily contrary to the federal scheme. The provisions of the contract are at worst ambiguous. Being ambiguous, the contract cannot be held invalid on a motion to dismiss. To the extent the contract is contrary to the conditions required by federal preemption law, there are more suitable remedies that the district court should consider before giving the plaintiff the state usury remedies.

I

As to the provisions of the contract, there are substantial arguments that the contract does not violate the law at all. As noted by the Federal Home Loan Bank Board (FHLBB) in its amicus curiae brief, both the preemption Act and the

agency regulations provide circumstances in which the creditor may repossess, accelerate, or foreclose "without notice." The Act directs FHLBB to issue a regulation that requires

> a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances).

Pub.L. No. 96-221, Title V, § 501(c)(2), 94 Stat. 161 (1980) (codified at 12 U.S.C.A. § 1735f-7 note). The implementing regulations provide:

> Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. . . . The debtor is not entitled to notice of default more than twice in any one-year period.

12 C.F.R. § 590.4(h)(1). Thus, in three separate situations a creditor may in fact accelerate, repossess, or foreclose without giving the 30-day notice otherwise required under section 590.4(h): (1) abandonment; (2) other extreme circumstances; and (3) upon the debtor's third default in a one-year period. Consequently, the contract's assertion that creditor may take action "without notice" upon debtor's default is not, as the court suggests, an "affirmative misrepresentation as to [the debtor's] statutory guarantees." 727 F.2d at 1072.

In all other default situations, the creditor is required to give the 30-day notice. The contract provides that the creditor's express powers to foreclose, accelerate, or repossess are "subject to any notice of right to cure." The court notes that our "[t]he qualification would, at most, inform the debtor that he *may* have a right to cure, but the law guarantees him an *absolute* right to cure." 727 F.2d at 1072 (emphasis in original). As pointed out above, however, the right to cure is not "absolute" in at least three specified cir-

cumstances. Given that the court concedes that the qualifying clause informs the debtor that he *may* have a right to cure, that is all that is necessary. For the court to hold that the creditor had to use language more specific than "subject to any notice of right to cure" undercuts the court's holding that "to qualify for federal preemption under the Act the financing agreement need not contain an express term guaranteeing the debtor thirty days notice before repossession or foreclosure." 727 F.2d at 1071.

It would be inconsistent with federal law for a preemption contract to claim an unqualified right to acceleration, repossess, or foreclosure "without notice." But because in some situations a creditor may indeed exercise such powers without notice, it is not inconsistent with federal law for a preemption contract to claim such a right "subject to any notice of right to cure," the express qualification contained in the Quiller contract. The contract language therefore does not prevent the loan from meeting the "terms and conditions" of the federal statute and regulations.

II

At most the contract would be ambiguous. With that determination, the court should remand for the district court to determine the intent of the parties. The contract was written to be a federal preemption contract. The words "FEDERAL PREEMPTION CONTRACT" appear in the contract in the bottom left corner of the very same page as the language held to be contrary to the federal preemption scheme. The conduct of the parties, the intention to make the agreement a federal preemption contract, and the intent of the borrower to make a legal contract and to pay the higher interest rate become relevant.

In holding that the agreement is contrary to the statute and regulations, the court characterizes the offending provisions as "inaccurate statements of the creditor's rights under federal law." *Id.* at 1072. Be that as it may, the contract does contain the "vague qualification" that its claimed

powers to immediately foreclose, repossess, and accelerate are "subject to any notice of right to cure." The court acknowledges that "[t]he qualification would, at most, inform the debtor that he *may* have a right to cure." *Id.* at 1072 (emphasis in original). In view of the ambiguity created by this "inconsistent language," this case should be remanded to the district court to conduct an evidentiary hearing, if necessary, to determine whether the parties intended to enter a federal preemption contract, and, if so, what was intended by the ambiguous language.

This is not to say, however, that the creditor could receive the benefits of federal preemption were it in fact to exercise its powers upon a debtor's default in a manner inconsistent with the federal statute and regulations. Nor would contract language that, unlike the language in the contract here, was indeed contrary to the consumer protections provided by the Act and regulations be saved by a creditor's actual compliance with the Act and regulations. The case before us, however, on appeal from the district court's order granting defendant's motion to dismiss, presents neither of those situations.

III

Once the "terms and conditions" are established, then the relief a party is entitled to obtain in court is to have the contract enforced according to those "terms and conditions." For a class, this may either be a declaratory decree or an injunction requiring the creditor to follow the contract's "terms and conditions."

In any event, the problem with notice might be easily curable by remedies not as harsh as that held by the court. At most, the case should be remanded to the district court to consider remedies that would preserve the bargain the parties intended to make. There is no question but that the parties intended to contract for a legal interest rate under the federal preemption law. The Georgia law of usury under

O.G.C.A. § 10-1-33 makes the civil penalties of the Georgia Motor Vehicle Sales Finance Act applicable:

> A violation of Code Section 10-1-33 by the seller or holder shall bar recovery of any finance charge, delinquency, or collection charge on the contract.

O.C.G.A. § 10-1-38(b). Asserting that the violation was wilful, the Quillers seek to recover double the time price differential under O.C.G.A. § 10-1-38(c). The penalty provisions do not authorize forfeiture of the unpaid principal of loans held violative of section 10-1-33. *See Bozeman v. Tifton Federal Savings & Loan Ass'n*, 164 Ga. App. 260, 297 S.E.2d 49 (1982); *Kelly v. Sylvan Motors, Inc.*, 160 Ga. App. 420, 287 S.E.2d 359, 360 (1981); *Ford Motor Credit Co. v. Spann*, 153 Ga.App. 535, 265 S.E.2d 863, 865 (1980); *Cook v. First National Bank*, 130 Ga.App. 587, 203 S.E.2d 870, 871 (1974); *see also Barrett v. Vernie Jones Ford, Inc.*, 395 F.Supp. 904, 909 (N.D.Ga. 1975), *aff'd*, 578 F.2d 1185 (5th Cir.1978). Georgia law indicates that the lender may recover this principal through the borrower's continued payments under the contract, unless the borrower was still in default after adjustment had been made to account for the forfeiture of the finance charge. *See Spann*, 265 S.E.2d at 865; *Bozeman*, 297 S.E.2d at 52. Nevertheless, the penalty sought by the Quillers would be harsh in a case where both parties intended to enter into a federal preemption contract governed by federal preemption law, under which the finance charge charged by Barclays/American and agreed to by the Quillers was legal.

Rather than applying state usury laws to require forfeiture of the finance charge, a more equitable remedy might be to invalidate the provisions contrary to federal law and enjoin enforcement of such provisions if necessary to protect the consumer. Such an approach was taken by this Court in a case where a provision of a loan contract violated regulations promulgated under the Georgia Industrial Loan Act. *Robinson v. Central Loan and Finance Corp.*, 609 F.2d 170, 175 (5th Cir.1980). Severance of the objectionable pro-

visions of the loan contract would be consistent with the "well known principle of contract law that an illegal contract provision, or one contrary to public policy, when invalidated, will be severed from the remainder of the contract if it is possible to do so without leaving the remainder of the contract meaningless." *Vineberg v. Brunswick Corp.*, 391 F.2d 184, 186 (5th Cir.1968). The provisions of the contract held to be contrary to federal regulations certainly could be severed from the contract before us without rendering it meaningless, especially in light of the fact that the contract before us contained a severability clause providing:

> If any part of this contract is invalid, unenforceable or inconsistent with the applicable laws or regulations of the State of Seller's address herein, such part shall be deemed amended, modified or deleted to conform thereto.

The Quillers contend that *Harrison v. Goodyear Service Stores*, 137 Ga.App. 223, 223 S.E.2d 261 (1976), and *General Finance Corp. v. Sprouse*, 577 F.2d 989 (5th Cir.1978), support application of the forfeiture provisions of O.C.G.A. § 10-1-38 in this case. In those cases, however, there was no dispute that the parties intended to enter contracts governed by Georgia law. *See Harrison*, 223 S.E.2d at 263 (contract governed by Georgia Retail Installment and Home Solicitation Sales Act); *Sprouse*, 577 F.2d at 991 (parties agreed contract was governed by Georgia Industrial Loan Act). Both decisions penalized creditors for charging or contracting to charge interest rates in excess of the statutory maximum under Georgia law. In contrast, in the case before us, the creditor contracted for a finance charge that was clearly permissible under federal law if the terms and conditions of the loan contract complied with federal law. In the event the district court finds that the parties intended to enter a legal contract under federal law, *Harrison* and *Sprouse* present no obstacle to a severance and injunctive remedy that would conform the terms and conditions of the contract to federal law rather than forfeiture of the finance

charge. Thus, even if the terms and conditions of the loan contract were contrary to federal law, the proper remedy would be to enjoin enforcement of those provisions absent any evidence that the creditor intended to enforce the illegal terms.

JAMES C. HILL, Circuit Judge, dissenting, with whom, FAY and R. LANIER ANDERSON, III, Circuit Judges, join:

I wholeheartedly concur with Judge Roney in his dissent, and write here only to express my fears that the court's treatment of this preemption loan agreement forecasts an excursion into hypertechnical "gamesmanship" similar to that apparent in litigation under the Truth-in-Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*

The usury preemption act was passed in 1980 during a time of historically high interest rates, when consumers who wished to purchase premanufactured homes were unable to obtain financing because financial institutions were unwilling to lend money for their purchase at the relatively low statutory interest levels prevailing in many states. In passing the preemption act, Congress constructively undertook to ease the severity of the mortgage credit crunch and insure the availability of mortgage credit in these states. S.Rep. No. 96-368, 96th Cong., 2d Sess. 18-19 (1979), *reprinted in* 1980 U.S.Code Cong. and Ad.News 236, 254-55. Although Congress concluded that purchasers of financing for premanufactured homes were entitled to additional consumer protections in order for their mortgages to fall within the preemption act, there is no doubt that the overriding objective of the act was to assist both borrowers and lenders by freeing up additional credit for housing. This was not intended to be a consumer protection disclosure act.

The majority opinion does not further the constructive purpose of the preemption act. The court holds that a lender loses the protection of the preemption act and is subject to the forfeiture provisions of state usury laws on

the basis of a contractual provision which is, at the most, merely ambiguous; even though both parties intended to enter into a federal preemption contract governed by federal law. This encourages a TILA-like game of "gotcha," where a borrower who wishes to serve as a class representative subjects the contracts to microscopic examinations to determine if it might be possible to claim damages for perceived disclosure violations in a situation where no "unwary" consumer has been misled. *See Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1385-86 (11th Cir.1984) (TILA violation) (Hill, J., dissenting).

The approach taken in the dissent authored by Judge Roney would further the purpose underlying the preemption legislation, while at the same time protecting the borrower from any violation of the federal act. A borrower can be adequately protected from actual violations of the act when and if they occur, at which time a counter-claim along the lines of the present action might be entertained. However, the sort of search for errors in draftsmanship upon which claims of violations might be predicated, encouraged by the court in this case, constitutes the court's enmity to the preemption act and a judicial attempt to defeat its purposes. Such "gamesmanship," permitted by the courts, has made what I perceive to be a mockery of the truth-in-lending laws. I hope that we do not travel down that road again in connection with this very useful law.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 83-8455

Arthur QUILLER,
and all other persons
similarly situated,

Plaintiffs-Appellants,

v.

BARCLAYSAMERICAN/
CREDIT, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

Decided: March 19, 1984

Before GODBOLD, Chief Judge, RONEY and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

To finance their purchase of a new mobile home, plaintiff-appellants entered into a retail installment sales contract, which the mobile home dealer then assigned to the defendant-appellee credit corporation, BarclaysAmerican/Credit, Inc. The Quillers' agreement obligated them to pay finance charges exceeding a thirteen percent add-on rate, in apparent violation of the Georgia Motor Vehicles Sales Finance Act, O.C.G.A. §§ 10-1-30 to -38 (Michie 1982), which limits the finance charge on sales of new mobile homes to a ten percent add-on. Alleging a violation of the Georgia Code, plaintiffs filed a class action against Barclays in the Superior Court of Richmond County, Georgia, seeking class certification, a declaratory judgment barring the defendant from collecting any finance charges from the named plain-

tiffs and all other persons similarly situated, and damages in an amount double the time-price differential for wilful violation of the Georgia act. Barclays then removed the case to the United States District Court for the Southern District of Georgia.

The applicability of state usury laws, however, has been greatly curtailed by federal legislation. Financing agreements that satisfy the requirements of the Depository Institutions Deregulation and Monetary Control Act, Pub.L. No. 96-221, Title V, § 501, 94 Stat. 161 (1980) (codified at 12 U.S.C. § 1735f-7 note) (the "Act"), preempt state law interest ceilings, thereby enabling creditors to charge a rate of interest in excess of state law limits. The Quillers' complaint alleged that its contract was not insulated from the ceiling imposed by the Georgia statute because the agreement did not comply with the prerequisites for preemption under federal law. Specifically, they charged that their contract did not contain a provision requiring the lender to notify the debtor thirty days prior to instituting any action leading to repossession or foreclosure, thus violating the Act and one of the regulations promulgated thereunder, 12 C.F.R. § 590.4(h) (1983). Attached to the complaint was a copy of the installment sales contract.

Barclays moved to dismiss for failure to state a claim, contending that the cause of action was barred as a matter of law by the Act and the statute of limitations. Pretermitting the statute of limitations question, the district court dismissed the action as precluded by the federal statute. We disagree and reverse the order dismissing the Quillers' claim.

Our threshold inquiry is whether the district court's dismissal was procedurally premature. The Quillers' contract states a claim for relief under Georgia law—the charging of a usurious interest rate, which, if proved, would entitle them to relief for violation of the Georgia Motor Vehicle Sales Finance Act. Barclays' Rule 12(b)(6) motion alleges the affirmative defense of federal preemption of the Georgia

statute. Generally, the existence of an affirmative defense will not support a motion to dismiss. Nevertheless, a complaint may be dismissed under Rule 12(b)(6) when its own allegations indicate the existence of an affirmative defense, so long as the defense clearly appears on the face of the complaint. *See, e.g., Concordia v. Bendekovic*, 693 F.2d 1073 (11th Cir. 1982) (party may raise affirmative defense of res judicata by 12(b)(6) motion when defense's existence may be judged on face of complaint); *Mann v. Adams Realty Co.*, 556 F.2d 288, 293 n. 6 (5th Cir. 1977) (defense of statute of limitations may appear on face of complaint). *See generally* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357 (1969). The claim may be adequately stated, as it is here, but in addition to the claim the complaint may include matters of avoidance that preclude the pleader's ability to recover. When this occurs, the complaint has a built-in defense and is essentially self-defeating. "[T]he problem is not that plaintiff merely has anticipated and tried to negate a defense he believes his opponent will attempt to use against him; rather plaintiff's own allegations show that the defense exists." *Id.* Although the Quillers' complaint would not be vulnerable to dismissal simply because they anticipated and attempted to negate the defense of federal preemption, if the complaint itself demonstrates that the Act governs the contract, a Rule 12(b)(6) dismissal would be proper.

Because the Quillers attached the installment sales contract to their pleadings, the district court properly examined the document to determine whether the defense of federal preemption was apparent on the face of the complaint. If the contract and complaint demonstrate that Georgia law does not apply because the agreement is governed by the Act, the action should be dismissed because it would appear beyond doubt that the Quillers could prove no set of facts in support of their claim. The district court therefore was procedurally correct in looking at the contract to determine whether it complied with the requirements of the federal statute.

Turning to the substance of the motion to dismiss, we first observe that the Act preempts state law limits on finance charges for sales of residential manufactured homes only if the financing arrangement complies with certain consumer protection regulations. Section 501(c) of the Act provides that the statute

> *shall not apply* to a loan, mortgage, credit sale, or advance which is secured by a first lien on a residential manufactured home *unless the terms and conditions relating to such loan,* mortgage, credit sale, or advance *comply with consumer protection provisions* specified in regulations prescribed by the Federal Home Loan Bank Board. *Such regulations shall—*
>
> . . . .
>
> (2) *require a 30-day notice* prior to instituting any action leading to repossession or foreclosure . . . .
>
> . . . .
>
> and (4) include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required.

Pub.L. No. 96-221, Title V, § 501(c) (emphasis added).

The regulation implementing subsection (c)(2) states:

> *[N]o action to repossess or foreclose, or to accelerate payment* of the entire outstanding balance of the obligation, *may be taken* against the debtor *until 30 days after the creditor sends the debtor a notice of default*
>
> . . . .

12 C.F.R. § 590.4(h) (1983) (emphasis added). The Quillers alleged in their complaint and maintain on appeal that the statute and regulation require the financing agreement to include a provision guaranteeing the debtor thirty days notice before repossession or foreclosure. Since their agreement contains no such clause, they contend that the con-

tract is not protected under the preemption statute and thus is governed by Georgia law.[1]

We reject the Quillers' interpretation of the statute and regulation. Neither requires that a thirty-day notice provision appear in the contract. The plain language of the regulation prohibits only the *act* of foreclosure or repossession without giving notice. The words "no action . . . may be taken" regulate the conduct of creditors attempting to exercise their rights upon default, not the written financing agreements themselves. When subsection 590.4(h) is read in conjunction with other regulations implementing the Act, it becomes clear that the Federal Home Loan Bank Board (the "Board") did not intend to require that the debtor's right to thirty days notice be recited in the contract. Subsections 590.4(d) (prepayment without penalty),[2] (e) (terms of balloon payments),[3] (f) (late charges),[4] and (g) (agreement for deferral of fees)[5] all contain express, unambiguous

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[1] On appeal the Quillers have argued additional reasons why their contract fails to qualify for protection under the Act. Since we decide *infra* that Barclays is not entitled to the benefits of federal preemption because the contract contravened the federal notice requirements, we need not decide the validity of the Quillers' other arguments.

[2] 12 C.F.R. § 590.4(d) provides: "*Prepayment penalties.* . . . The right to prepay shall be disclosed in the loan contract in type larger than that used for the body of the document."

[3] 12 C.F.R. § 590.4(e) provides: "*Balloon Payments.* (1) No creditor may enter into an agreement with a debtor which requires or anticipates a schedule of payments under which any one payment is more than twice the amount of an otherwise regularly scheduled payment. . . . (3) The parties may agree in writing to payments that are not substantially equal or that are paid at unequal intervals. . . ."

[4] 12 C.F.R. § 590.4(f) provides: "*Late Charges.* (1) No late charge may be assessed, imposed, or collected unless provided by written contract between the creditor and debtor. . . ."

[5] 12 C.F.R. § 590.4(g) provides: "*Deferral Fees.* (1) With respect to mobile home transactions containing precomputed finance charges, agreements providing for deferral of all or part of one or more installments shall be in writing, signed by the parties, and (i) Provide . . . ."

statements requiring specific rights of the debtor to be delineated in the written agreement. Subsection (h) contains no similar requirement. If an express contractual notice provision had been intended, the Board would have so provided in unambiguous terms.

Nor does the statute itself require a contractual notice provision. It states only that a loan does not qualify for federal protection unless the terms and conditions relating to such a loan comply with the consumer protection regulations of the Board. Rather than regulating the specific terms of financing agreements, the statute delegates this authority to the Board. Although subsection (c)(2) does direct the Board to promulgate a thirty-day notice regulation, the statute does not demand that the regulation require the notice provision to appear in the contract. The Act merely requires the agreement to comply with the regulations, which do not themselves require an express notice provision.

Our construction of regulation 590.4(h) and the statute is consistent with the Board's own interpretation. An opinion letter of the Board's general counsel concludes, "This requirement [§ 590.4(h)] refers only to the act of giving notice; neither paragraph (h) nor the Congressional legislation that it implements . . . expressly requires that a covered credit agreement recite the purchaser-borrower's right to notice." 5 Fed.Banking L.Rep. ¶83,027 (1983). In an amicus brief filed by the Board in this case, the agency has embraced the conclusion of its general counsel. Since the agency's view of its own regulation and the statute it oversees is not "demonstrably irrational," we should give great weight to its interpretation. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 100 S.Ct. 790, 797, 63 L.Ed.2d 22 (1980); *see also Sage v. Freedom Mortgage Co.*, 704 F.2d 1519, 1521 (11th Cir.1983) (en banc). We therefore hold that to qualify for federal preemption under the Act the financing agreement need not contain an express term guar-

anteeing the debtor thirty days notice before repossession or foreclosure.

Although federal law does not mandate a contractual notice provision, the creditor cannot obtain the benefits of preemption if the financing agreement contains express provisions authorizing conduct *contrary* to the statute or regulations. While there is no affirmative duty to disclose to the debtor his statutory right to notice before repossession or foreclosure, if the contract permits the creditor to repossess or foreclose immediately upon default, the "terms and conditions" relating to the loan agreement do not comply with regulation § 590.4(h) and the creditor cannot claim the benefits of federal preemption.

In determining whether the terms and conditions of this agreement comply with the Board's consumer protection regulations, we should keep in mind that Congress included manufactured home financing in its preemption scheme only on the condition that consumer-debtors would be guaranteed certain safeguards. *See* H.Conf.Rep. No. 96-842, 96th Cong., 2d Sess. 79, *reprinted in* 1980 U.S.Code Cong. & Ad.News 298, 309. Because purchasers of mobile homes frequently are unaware of complicated rules of contract construction, we should examine the contract through the eyes of the typical consumer and determine whether the lender could use the terms of the contract to impose illegal burdens on a debtor with no knowledge of his statutory rights. It would be unrealistic to assume that every illegal act will be corrected through litigation. *See General Finance Corp. of Georgia v. Sprouse*, 577 F.2d 989 (5th Cir. 1978) (when interpreting contracts in light of consumer legislation, court should consider actual operation of contract in commercial world, effect upon consumer not familiar with legal rights, and risk that contract might allow lender to employ ambiguous provisions to his advantage). The rule of construction that ambiguities and inconsistencies should be resolved against the drafter, *Landale Enterprises, Inc. v.*

Berry, 676 F.2d 506 (11th Cir.1982), is particularly appropriate in the areas protected by consumer legislation.

The Quiller contract provides in part:

> If Customer defaults on any obligation under this contract, or if Holder shall consider the indebtedness or the Collateral insecure, *the full balance may, upon election of Holder, without notice, subject to any notice of right to cure, become due and payable*, less the required rebate of the Finance Charge . . . . Customer agrees in any such case to pay said amount or, at Holder's election, to deliver the Collateral to Holder, and Holder may, *without notice or demand for performance or legal process*, peaceably enter any premises, but not into any dwelling, where the Collateral may be found, peaceably take possession of it and custody of anything found in it.

The agreement includes language that, on its face, is contrary to the requirements of the statute and regulations. It permits the creditor (1) to foreclose on the loan "without notice;" (2) to repossess "without notice or demand for performance or legal process;" and (3) to demand payment of the full balance upon the debtor's default or the creditor's insecurity "without notice." These provisions are inaccurate statements of the creditor's rights under federal law. The only language that might apprise the debtor of his statutory right to notice is the vague qualification that the creditor's express, contractual powers to immediately foreclose, repossess and accelerate are "subject to any notice of right to cure." Unless the debtor has acquired knowledge of his statutory right to cure from some outside source, however, this language will not accurately notify him of his contractual rights. The qualification would, at most, inform the debtor that he *may* have a right to cure, but the law guarantees him an *absolute* right to cure. This inconsistent language goes further than simply remaining silent on the debtor's right to notice upon default; by declaring the creditor's unauthorized power to foreclose immediately, the con-

sumer is given an affirmative misrepresentation as to his statutory guarantees.

Barclays contends that its contract does comply with the regulations because § 590.4(h) cannot be violated until the creditor actually forecloses, repossesses or accelerates payment without giving thirty days notice. The argument misconstrues the language of the Act and the policies behind it. The statute and regulations allow a creditor to draft a contract that does not expressly grant the debtor a right to thirty days notice. But when the contract affirmatively allows the creditor to foreclose, repossess or accelerate payment immediately upon default, subject to an undefined, potential right to cure, the "terms and conditions" relating to the loan agreement do not comply with the regulations or the statute. By authorizing immediate action upon default, Barclays has introduced a contract term that violates the Act. It may not claim the benefits of the federal law while at the same time failing to provide the consumer protections that are the price for those benefits. We therefore hold that the Quiller contract does not qualify for protection under the preemption statute. The district court's grant of defendant's motion to dismiss on this ground is REVERSED, and we REMAND for further proceedings.

RONEY, Circuit Judge, dissenting:

I respectfully dissent from the Court's holding that the Quiller contract does not qualify for protection under the Federal Preemption Statute. I agree with the court that the thirty-day notice provision is not required to be in the contract. I cannot agree that the remedy applied here is suitable because of the language in the contract concerning the notice requirement.

When the contract is obviously drawn and intended by all parties to permit them to take advantage of the Federal Preemption Statute, it is unduly harsh to throw the whole contract out just because it contains language which appears to violate the thirty-day notice requirement. Rather

than applying state usury laws to a contract which could not have been validly made thereunder, it would be more equitable to simply invalidate this contract clause to the extent it violates the consumer regulations, and enjoin enforcement if that remedy is deemed necessary to protect the consumer.

This result would further the twin arms fo the Federal Preemption Act: assuring the availability of consumer credit for the purchase of manufactured housing and according protection to consumer borrowers, without impacting so unnecessarily into a carefully conceived financing program established to meet the needs of both parties in a time of rising cost of money.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CV 183-87

ARTHUR QUILLER, LILLIE
MAE QUILLER and All Other
Persons Similarly Situated,

Plaintiffs

vs.

BARCLAYSAMERICAN/CREDIT,
INC.,

Defendant.

ORDER

Presently before the Court is the defendant's motion to dismiss. In support of its motions, the defendant asserts that the plaintiffs' claims are barred as a matter of law by federal preemption and the statute of limitations.

Pretermitting the defendant's statute of limitations argument, I conclude, in light of the arguments heard in this matter on June 10, 1983, that the defendant's motion is well-founded. Accordingly, it is hereby GRANTED.

ORDER ENTERED at Augusta, Georgia, this 14th day of June, 1983.

/s/ Dudley H. Bowen, Jr.

UNITED STATES DISTRICT
JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 83-8456

Jack GRANT, Jr.,
Evelyn H. Grant,
and all other persons
similarly situated,

Plaintiffs-Appellants,

v.

GENERAL ELECTRIC
CREDIT CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

Decided: July 8, 1985

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK* , Circuit Judges.

PER CURIAM:

This is the second of two cases taken *en banc* to determine whether the mobile home financing contracts involved satisfy certain conditions imposed by federal law that would entitle the contracts to be exempt from state law interest ceilings. By meeting the requirements of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. No. 96-221, Title V, § 501, 94 Stat. 161 (1980)

* Circuit Judge Thomas A. Clark, recused himself and did not participate in this decision.

(codified at 12 U.S.C.A. § 1735f-7 note) (the "Act") and the regulations promulgated thereunder by the Federal Loan Bank Board (FHLBB), *see* 12 C.F.R. § 590.4, certain financing agreements preempt state law interest ceilings, thereby enabling creditors to charge a rate of interest in excess of state law limits.

In the other case, a panel of this Court had held that, although a contract need not contain express terms tracking the provisions of the statute or regulations to qualify for preemption, "a creditor cannot obtain the benefits of preemption if the financing agreement contains express provisions authorizing conduct *contrary* to the statute or regulations." *Quiller v. BarclaysAmerican/Credit, Inc.*, 727 F.2d 1067 (11th Cir.1984). That panel opinion has now been reinstated by the *en banc* court. *Quiller v. BarclaysAmerican/Credit, Inc.*, slip op. ___, ___, ___ F.2d ___, ___ (11th Cir. 1985) (en banc) [No. 83-8455, slip op., July 1, 1985]. In this case the Court now decides that the different contract provisions before us are not clearly contrary to the requirements of the statute and regulations, so the creditors are entitled to the benefits of federal preemption. The district court's dismissal of this action is affirmed.

The Grants' Claim

In February 1982, plaintiffs Jack and Evelyn Grant purchased a mobile home from Hutchinson Homes, Inc. The parties entered into a retail sales installment agreement on a form contract prepared by defendant General Electric Credit Corporation (GECC), to which Hutchinson Homes assigned the contract shortly after the Grants took possession of the mobile home. The interest rate on the contract exceeded an add-on rate of 13.6%, 3.6% higher than the 10% maximum finance charge then allowed under the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. §§ 10-1-30 to -38 (Michie 1982).

In March 1983, the Grants instituted a class action against GECC in federal district court alleging a violation

of anticipating that GECC would raise the defense that the interest rate was valid under section 501 of the federal Act, the Grants alleged that the GECC contract lacked the consumer protections required by the Act as a condition to exempting the finance charge from the state usury law interest ceilings. The district court dismissed the action as preempted by federal law.

The Grants contend the GECC contract failed to comply with the FHLBB regulations in five particulars. Four of these instances involve the following language contained in one sentence of the GECC contract:

> In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the *FINANCE CHARGE* designated as Time Price Differential calculated by the Pro-Rata Method provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.

Following the holding in *Quiller*, we examine separately, in the order in which they were presented, arguments that the GECC contract is directly contrary to the federal statute and regulations.

Right to Notice Prior to Acceleration

The Grants contend that the phrase "Seller may declare immediately due and payable any and all installments due or to become due hereumder . . ." is a "term or condition" of the contract that fails to comply with 12 C.F.R. § 590.4(h), which states that "no action . . . to accelerate payment of the entire outstanding balance of the obligation . . . may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default." The contract language, the Grants argue, reserves for GECC the right to declare the entire contract "immediately due and payable," contrary to the 30-day notice required by the regulations. The GECC contract contains, however, the qualifying

clause "provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right."

As held in *Quiller*, the federal preemption statute does not require a disclosure in the contract of the notice rights given by the Act and regulations, nor does it eliminate the creditor's right to accelerate upon default. A creditor is required to send the debtor a notice of default providing a 30-day grace period during which the debtor may correct the default and continue with the contract as though the default had not occurred. 12 C.F.R. § 590.4(h). The GECC contract's qualifying clause, which is cast in mandatory terms, unambiguously informs the debtor that he or she "shall be given notice of right to cure default" before "seller is permitted" to exercise its right to accelerate. Although the contract does not reveal that the debtor has 30 days in which to cure the default, there is no contention that notices sent to the Grants failed to notify them of the 30-day grace period. That grace period is prominently revealed in the sample notice of default and right to cure contained in the regulations. *See* 12 C.F.R. § 590.4(h)(2).

This "term or condition" of the contract is not contrary to the statute and regulations governing federal preemption.

Acceleration of the Entire Balance

The Grants also contend that the acceleration provision of the contract is contrary to the following portion of the FHLBB regulations:

> In the case of default in payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as described above. The debtor is not entitled to notice of default more than twice in any one-year period.

12 C.F.R. § 590.4(h). The Grants argue that the contract provision allowing GECC to accelerate "all installments due or to become due hereunder, less the unearned portion of the finance charge" is contrary to the regulations.

The quoted portion of the regulations, however, refers to the content of the notice of default, not to the provisions of the contract. There is no allegation that GECC sent the Grants a notice of default with language contrary to that of 12 C.F.R. § 590.4.

Provisions Concerning Right to Cure Default

The Grants argue that because 12 C.F.R. § 590.4(h) requires that a debtor be given the right to cure any default for 30 days, and because notice of that fact must be communicated to the debtor, the GECC contract's reference to an undefined "notice of right to cure" is inadequate. Again, however, the Grants take the regulation's requirements for the notice of default and attempt to apply them to the terms of the contract itself. The regulation does *not* provide that "no contact qualifies for preemption" unless it discloses the 30-day notice, but rather that "no action . . . to accelerate . . . may be taken" without the notice. 12 C.F.R. § 590.4(h); *see Quiller*, 727 F.2d at 1070. Thus, the notice section of the regulations is in direct contrast with other sections of the regulations which expressly require disclosure of certain information within the loan contract. *See* 12 C.F.R. § 590.4(d) ("The right to prepay shall be disclosed in the loan contract. . . ."); *id.* § 590.4(f) ("No late charge may be assessed, imposed, or collected unless provided for by written contract between the creditor and debtor."). As the *Quiller* court held, 12 C.F.R. § 590.4(h) does not require creditors to recite in the loan contract the specific rights of a defaulting debtor. 727 F.2d at 1070.

Right to Notice Prior to Repossession or Foreclosure

The Grants contend that the Act itself requires that preemption contracts disclose a defaulting debtor's right to 30 days notice prior to repossession or foreclosure. The GECC contract is silent with regard to foreclosure and repossession. Thus, in the absence of express contractual terms authorizing conduct contrary to federal law, this argument is foreclosed by our holding in *Quiller* that "to qualify for federal preemption under the Act the financing agreement need not contain an express term guaranteeing the debtor thirty days notice before repossession or foreclosure." 727 F.2d at 1071.

Although the Grants have not claimed that the GECC contract contains terms or conditions contrary to the right to a 30-day notice prior to repossession or foreclosure, they contend that absence of any reference to that right permits the creditor to repossess without notice by operation of Georgia law. In Georgia, a creditor may repossess by self help without notice unless the contract contains a specific provision to the contrary. O.C.G.A. § 11-9-503; *see also Ford Motor Credit Co. v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978). A creditor may also foreclose upon 7-days notice pursuant to a judicial writ of possession. O.C.G.A. § 44-14-231, -232(b). The Grants' argument fails for the simple reason that the issue before us is not what Georgia law requires, but what the federal preemption scheme requires, as there appears to be no question of fact as to whether the parties intended to enter a federal preemption contract.

We recognize that in individual cases the lack of specific contract language might allow an unscrupulous creditor to foreclose or repossess without notice by preying on consumers unaware of their notice rights under federal law or by litigating before state court judges who might interpret the agreement under Georgia law due to unfamiliarity with the complexities of the federal preemption scheme. But there is no allegation that GECC conducted its business in such a

manner. Such an argument would convert the law into a disclosure act. Arguments for such a change must be addressed to the FHLBB or congress, not to this Court.

Right of Prepayment Without Penalty

As a final challenge to the contract itself, the Grants focus on the requirement of 12 C.F.R. § 590.

> A debtor may prepay in full or in part the unpaid balance of the loan at any time without penalty. The right to prepay shall be disclosed in the loan contract in type larger than that used for the body of the document.

The Grants argue the type size of the print was not larger than that used in the body of the contract. A review of the contract reveals that the prepayment clause is set in type clearly larger than that of the text surrounding it which comprises the "body" of the contract. Although certain headings and clauses in other parts of the contract are set in larger or bolder type, the type size used here is larger than "the body of the document" and fulfills the regulation's purpose to call attention to the provision. *See* 45 Fed. Reg. 43684 (June 30, 1980). The regulation does not require the disclosure in the largest type used in the instrument.

Significantly, the version of 12 C.F.R. § 590.4(d) originally proposed by the FHLBB required that the prepayment clause be "conspicuously disclosed in the loan contract." 45 Fed. Reg. 31124 (May 5, 1980). The FHLBB replaced that phrase with the current type-size requirement because "the Board agree[d] that [the "conspicuous" requirement] may be potentially troublesome." 45 Fed. Reg. 43684. (June 30, 1980). This litigation demonstrates that the alteration in the regulations failed to eliminate "troublesome" disputes.

Defendant's Failure to Show Loan's Entitlement to Federal Preemption

As an alternative ground for reversal, the Grants urge that GECC made no showing that the financing transaction was a "federally related mortgage loan" eligible for preemption under the Act. Throughout the proceedings in the district court, however, the Grants never suggested that given an appropriate contract this financing transaction would fail to qualify for preemption. For instance, in their complaint plaintiffs admitted that "[f]ederal law would have allowed additional interest to be charged had the lender complied with certain prerequisites specified in the federal statute," and then proceeded to enumerate the alleged contractual shortcomings. The closest the Grants came to raising the "federally related mortgage loan" argument in the district court was in their opposition to GECC's motion to dismiss, which remarked:

> Defendant has made no showing in that regard but assuming, for the sake of argument, that the transaction would meet the definition of a "federally-related mortgage loan," the next question is whether the terms and conditions of the credit sales contract allow it to be preempted from the state law that would normally govern.

Aside from this isolated statement, which hardly amounts to much more than conceding the issue, the Grants never mentioned, much less argued, to the district court that their financing transaction could not come under the Act. The thrust of the complaint and other papers filed there reflect only the central argument that the "terms and conditions" of the GECC contract failed to satisfy the requirements of the Act and regulations. Having failed to raise the issue before the district court, the Grants cannot raise the issue for the first time on appeal. *See Case v. State Farm Mutual Automobile Insurance Co.*, 294 F.2d 676, 678 (5th Cir. 1961).

Conclusion

The provisions of the GECC contract before us differ significantly from those in the contract found to be contrary to the federal statute and regulations in *Quiller*. We held that the language in the *Quiller* contract inaccurately stated the creditor's rights under the federal preemption scheme by permitting the creditor (1) to foreclose on the loan "without notice;" (2) to repossess "without notice or demand for performance or legal process;" and (3) to demand payment of the full balance upon the debtor's default or the creditor's insecurity "without notice." 727 F.2d at 1072. The contract's qualification that these express contractual powers of the creditor were "subject to any notice of right to cure" was held to be vague and equivocal, and in any event, inconsistent with the three specific reservations of creditor's rights to be exercised "without notice." In contrast, GECC's contract makes no mention of the creditor's right to foreclose or repossess upon the debtor's default, nor does it purport to assume such powers in the event of the creditor's general "insecurity." The only specific reservation that GECC did make concerns the right to accelerate upon default. This right is expressly conditioned in clear, mandatory terms upon the debtor's receipt of notice of right to cure a default prior to acceleration. In sum, the affirmative misrepresentations of the debtor's federal statutory guarantees that existed in the agreement in *Quiller* are not present in the GECC contract.

Having held that the "terms and conditions" of the GECC contract satisfied the prerequisites for obtaining the protection of the Federal preemption scheme, we need not address defendant's argument that the Grants' state law claim is foreclosed by Georgia's one-year statute of limitations for usury actions. The order of the district court dismissing the Grants' complaint is therefore

AFFIRMED.

KRAVITCH, Circuit Judge, dissenting, with whom, GODBOLD, Chief Judge, and VANCE, Circuit Judge, join:

I respectfully dissent. In *Quiller v. BarclaysAmerican/Credit, Inc.*, slip op. ___, ___ F.2d ___ (11th Cir. 1985) (en banc), this court reinstated the panel's opinion, which held that a contract containing terms contrary to the requirements of the Depository Institutions Deregulation and Monetary Control Act, 12 U.S.C. § 1735f-7 (note), and regulations promulgated thereunder, is not entitled to the protection of federal preemption of state interest rate ceilings. In this case, the majority perceives sufficient distinctions between the language of the *Quiller* contract and the one under scrutiny here to warrant assertion of the preemption defense. Although I agree that General Electric Credit Corporation's (GECC) contract does not suffer from the same defects as the *Quiller* contract, I disagree with the majority's conclusion that GECC's contract is entitled to protection under the federal preemption scheme.

In *Quiller*, we began our analysis of the contract by admonishing that "we should examine the contract through the eyes of the typical consumer and determine whether the lender could use the terms of the contract to impose illegal burdens on a debtor with no knowledge of his statutory rights." Slip op. ___, ___ F.2d at ___. This rule of interpretation is consistent with Congress's decision to include manufactured home financing in the preemption scheme only on the condition that consumer-debtors would enjoy certain protections under finance agreements. Further, we determined that it would be unrealistic to assume that all inaccurate statements of rights and actions taken pursuant thereto would be remedied through litigation. Although we concluded that to qualify for preemption a financing agreement need not contain an express term guaranteeing the debtor thirty days notice prior to repossession or foreclosure, we held that contracts that affirmatively allowed a creditor to take action inconsistent with the debtor's right

to notice and right to cure were not federal preemption agreements. *Id.* slip op. at ___, at ___.

GECC's credit agreement provides in part:

> In the event of Buyers' default in payment when due, Seller may declare *immediately* due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the FINANCE CHARGE designated as Time Price Deferential calculated by the Pro-Rata Method *provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.* . . .

(emphasis in italics added). Because the contract grants the creditor the right, upon default, to accelerate immediately payment of any or all installments, it is contrary to 12 C.F.R. § 590.4(h), which prohibits initiation of any action to accelerate payments until 30 days after the creditor sends the debtor a notice of default and right to cure. Further, section 590.4(h) provides that the "sum stated in the notice of default may only include payments in default and applicable late or deferral charges. . . ." A provision allowing *all* future payments to become due *immediately* upon default is thus an inaccurate statement of the creditor's rights, in that under section 590.4(h), the debtor has the right to cure the default, by paying the amount in default plus any late charges, *before* the creditor may accelerate payments.

The majority relies on the qualifying clause ("provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right") to conclude that the contract unambiguously informs the debtor of the right to cure the default before the creditor may accelerate payments. Although this provision is not as vague or equivocal as the qualifying clause in the *Quiller* contract, slip op. at ___, ___ F.2d at ___, in my view it fails to remedy the inaccurate statement of rights already conveyed by the agreement. Read as a whole, the challenged passage could be fairly construed by a consumer-debtor to transmit conflicting messages: the creditor's right to declare immediately

upon default that all installments are due, and the debtor's right to cure before the creditor exercises that right. Moreover, there is no explanation that the right to cure means paying only the amount in default plus any late charge. As the majority observes, there is no requirement that this be explained in the contract; yet, given the creditor's right under the contract to accelerate immediately upon default, the unexplained right to cure fails to offer a statement sufficient to qualify the agreement as a preemption contract.[1] As in the *Quiller* contract, a debtor who reads this provision may receive an accurate impression of his or her rights upon default, if he or she had independent knowledge of the applicable statute and regulations. Absent this, however, a debtor could easily conclude that the creditor can accelerate immediately upon default, subject to some un-

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[1] In an effort to reconcile the GECC contract with section 590.4(h), the majority explains that the portion of the regulation setting forth the amount due upon default refers only to the notice of default, not to provisions that must be contained in a preemption contract. Slip op. at ___, ___ F.2d at ___. I believe the majority overlooks the fact that the agreement grants the creditor the right to accelerate payments immediately upon default. The regulation provides that the sum stated in the notice of default may not exceed the amount in default plus an applicable late charge; thus, a creditor is forbidden to accelerate payments immediately upon default of one payment. The debtor must have the opportunity to cure by paying the amount stated in the notice of default.

Twice the majority observes that there is no allegation that GECC sent the Grants a notice of default that contradicted the form set forth in the regulations. Slip op. at ___, ___, ___ F.2d at ___, ___. This ignores *Quiller's* focus on the language of the agreement. To await the creditor's actual performance upon default would allow a creditor who drafts a contract that contradicts every right granted to the consumer-debtor by the regulations to claim a preemption defense if there is no effort to enforce the unlawful provisions. We would not know, however, whether the creditor attempted to enforce the unlawful provision unless the debtor filed a lawsuit. As we observed in *Quiller*, "It would be unrealistic to assume that every illegal act will be corrected through litigation." Slip op. at ___, ___ F.2d at ___ (citing *General Finance Corp. of Georgia v. Sprouse*, 577 F.2d 989 (5th Cir. 1978)).

specified right to cure. At best, the language of the agreement is ambiguous.[2]

The focus of our *Quiller* decision was to prevent creditors from exercising leverage over unwary consumer-debtors faced with default. Congress sought to ensure that consumer-debtors would not immediately lose their homes upon the failure to tender a single payment on time, by guaranteeing the debtors' right to cure and right to notice before repossession, foreclosure or acceleration. I do not believe that GECC's credit agreement fulfills this purpose. Accordingly, I would hold that the GECC contract is not entitled to the benefits of federal preemption.

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[2] Language, of course, can be inherently ambiguous, and some debtors may not understand their rights under an agreement no matter how clear the terms. Nonetheless, although the statute and regulations do not require that certain provisions be set forth explicitly in an agreement, the onus is on the creditor who wishes to claim the preemption defense to draft a document that does not contradict rights guaranteed by the regulations. When doing so, the creditor must employ language that makes the contract readily understandable by a reasonable consumer-debtor. *Quiller*, slip op. at ___, ___ F.2d at ___. *Cf. Jeter v. Credit Bureau*, 754 F.2d 907, 910-13 (11th Cir. 1985) (to determine whether Fair Debt Collection Practices Act has been violated, court is obligated to decide whether least sophisticated consumer would be deceived, misled, or harassed by creditor's actions).

APPENDIX E

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 83-8456

Jack GRANT, Jr., Evelyn H. Grant, and all other persons similarly situated,

Plaintiffs-Appellants,

v.

GENERAL ELECTRIC CREDIT CORPORATION.

Defendant-Appellee.

Before GODBOLD, Chief Judge, RONEY and KRAVITCH, Circuit Judges.

Decided: March 19, 1984

PER CURIAM:

Plaintiff-appellants purchased a mobile home from Hutchinson Homes, Inc. in February 1982. The parties entered into a retail installment sales contract on a form prepared by the defendant-appellee, General Electric Credit Corporation (GECC), which obtained the contract by assignment from Hutchinson shortly after the Grants took possession of the home. The rate of interest on the contract exceeded an add-on rate of 13.6%, 3.6% higher than the maximum finance charge on mobile home contracts allowed under the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. §§ 10-1-30 to -38 (Michie 1982).

The Grants filed a complaint in the District Court for the Southern District of Georgia on behalf of themselves and a class of all persons similarly situated, seeking damages and injunctive relief for the alleged violation of Georgia law. In

addition to setting forth the state law claim, the complaint attempted to refute an anticipated defense that the high interest rate was valid under § 501 of the Depository Institutions Deregulation and Monetary Control Act, Pub.L. No. 96-221, Title V, 94 Stat. 161 (1980)(codified at 12 U.S.C. § 1735f-7 note) (the "Act"), which preempts state usury laws governing mobile home financing if the lender complies with certain consumer protection regulations. Attached to the complaint was a copy of the financing agreement. After a hearing on a defendant's motion to dismiss for failure to state a claim, the district court dismissed the action, concluding that the Act governed the contract and that the finance charge was thus protected under federal law. We reverse.

The Grants alleged in their complaint and maintain on appeal that GECC did not comply with the conditions imposed by the Act and the implementing regulations, and that the contract is therefore governed by Georgia law. Specifically, they contend that the contract impermissibly allows GECC to immediately declare the entire contract due and payable upon the buyer's default without giving the debtor thirty days notice and right to cure as provided in the Act and 12 C.F.R. § 590.4(h)(1983). [1]

This case is controlled by our decision in *Quiller v. BarclaysAmerican/Credit, Inc.*, slip op. at 2248, ___ F.2d ___ (1983), where we held that although neither the Act nor the regulations requires the lender to include a thirty-day notice provision in the financing agreement, if the contract contains a term or condition inconsistent with the regula-

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[1] In an amended complaint filed shortly before the district court rendered its decision and in their appeal to this court, the Grants have alleged additional reasons why their contract does not comply with federal law. Because we decide *infra* that the Grants are entitled to a reversal of the district court's dismissal based upon the contract's failure to accurately state the creditor's right to accelerate, we need not decide the validity of their other contentions.

tions, the creditor may not obtain the benefits of the federal statute.

Section 501(c) of the Act authorizes the preemption of state usury limits only if the "terms and conditions" of the loan agreement comply with the consumer protection regulations promulgated by the Federal Home Loan Bank Board. The regulation applicable to this contract provides:

> *[N]o action to repossess or foreclose, or to accelerate payment* of the entire outstanding balance of the obligation, *may be taken* against the debtor *until 30 days after the creditor sends the debtor a notice of default.* . . . In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges . . . .

12 C.F.R. § 590.4(h) (1983) (emphasis added).

The Grants' contract provides in part:

> In the event of Buyer's default in payment when due, Seller may declare *immediately* due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the FINANCE CHARGE designated as Time Price Deferential calculated by the Pro-Rata Method *provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.* . . .

This passage is directly contrary to the statute and § 590.4(h) of the regulations because it grants the creditor the right, upon default, to immediately accelerate payment of any and all installments due or to become due under the contract. The regulation unequivocally forbids the creditor from immediately demanding all installments due and payable upon default; it can only do so thirty days after the creditor sends the debtor notice of default and right to cure. Moreover, the regulation provides that the sum stated in the notice may only include payments in default plus any applicable late charges. The creditor may not, as this contract allows, declare all installments due and payable as

soon as the debtor defaults on payments. A provision allowing all future payments to become due immediately upon default is an inaccurate statement of the creditor's rights in the federal scheme.

The qualifying clause here ("provided that Buyer shall be given notice of right to cure . . . .") may more accurately inform the debtor of his absolute right to notice than did the qualifying clause in *Quiller*,[2] but the clause does not remedy the inaccurate statement of the creditor's power already conveyed. The passage transmits two conflicting messages: the creditor's right to declare all installments immediately due and payable and the debtor's right to cure before the creditor exercises that right. As in the Quiller contract a debtor reading this provision might receive an accurate impression of his rights if he is aware of the federal statute, but absent this outside knowledge, the debtor can only conclude that the creditor may accelerate immediately upon default, subject to some unspecified right to cure.

Since the § 590.4(h) forbids immediate acceleration, the contract does not comply with the regulation. When a financing agreement includes a term that is inconsistent with one of the Act's implementing regulations, the applicability of state law to the contract is not preempted. We therefore reverse the district court's dismissal of the complaint. REVERSED and REMANDED.

RONEY, Circuit Judge, dissenting:

I respectfully dissent for the reasons stated in my dissent in *Quiller v. BarclaysAmerican/Credit, Inc.*, ___ F.2d ___, ___ (11th Cir. 1984) [No. 83-3455, slip op. at 2253, (11th Cir. March 19, 1984)].

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[2] The contract in *Quiller* allowed the lender to foreclose, repossess or accelerate payment "without notice, subject to any notice of right to cure. . . ." slip op. at 2252, ___ F.2d at ___ (1983).

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CV 183-96

JACK GRANT, JR. and MRS. EVELYN H. GRANT,

Plaintiffs,

vs.

GENERAL ELECTRIC CREDIT CORPORATION,

Defendant.

ORDER

Presently before the Court is defendant's motion to dismiss. In support of its motion, the defendant asserts that the plaintiffs' claims are barred as a matter of law by federal preemption and the statute of limitations.

Pretermitting that defendant's statute of limitations argument, I conclude in light of the arguments heard in this matter on June 10, 1983, that the defendant's motion is well-founded. Accordingly, it is hereby GRANTED.

ORDERED entered at Augusta, Georgia, this 14th day of June, 1983.

/s/ Dudley H. Bowen
Judge

United States District Court
Southern District of Georgia

APPENDIX G

Depository Institutions Deregulation And Monetary Control Act of 1980, Pub. L. No. 96-221, Title V § 501, 94 Stat. 164, (March 31, 1980), codified at 12 U.S.C. § 1735f-7 note.

Part A—Mortgage Usury Laws

SEC. 501.(a)(1) The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is—

(A) secured by a first lien on residential real property, by a first lien on stock in a residential cooperative housing corporation where the loan, mortgage, or advance is used to finance the acquisition of such stock, or by a first lien on a residential manufactured home;

(B) made after March 31, 1980; and

(C) described in section 527(b) of the National Housing Act (12 U.S.C. 1735f-5(b)), except that for the purpose of this section—

(i) the limitation described in section 527(b)(1) of such Act that the property must be designed principally for the occupancy of from one to four families shall not apply;

(ii) the requirement contained in section 527(b)(1) of such Act that the loan be secured by residential real property shall not apply to a loan secured by stock in a residential cooperative housing corporation or to a loan or credit sale secured by a first lien on a residential manufactured home;

(iii) the term "federally related mortgage loan" in section 527(b) of such Act shall include a credit sale which is secured by a first lien on a residential manufactured home and which otherwise meets the definitional requirements of section 527(b) of such Act, as those requirements are modified by this section;

(iv) the term "residential loans" in section 527(b)(2)(D) of such Act shall also include loans or credit sales secured by a first lien on a residential manufactured home;

(v) the requirement contained in section 527(b)(2)(D) of such Act that a creditor make or invest in loans aggregating more than $1,000,000 per year shall not apply to a creditor selling residential manufactured homes financed by loans or credit sales secured by first liens on residential manufactured homes if the creditor has an arrangement to sell such loans or credit sales in whole or in part, or if such loans or credit sales are sold in whole or in part to a lender, institution, or creditor described in section 527(b) of such Act or in this section or a creditor, as defined in section 103(f) of the Truth in Lending Act, as such section was in effect on the day preceding the date of enactment of this title, if such creditor makes or invests in residential real estate loans or loans or credit sales secured by first liens on residential manufactured homes aggregating more than $1,000,000 per year; and

(vi) the term "lender" in section 527(b)(2)(A) of such Act shall also be deemed to include any lender approved by the Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act.

(2)(A) The provisions of the constitution or law of any State expressly limiting the rate or amount of interest which may be charged, taken, received, or re-

served shall not apply to any deposit or account held by, or other obligation of a depository institution. For purposes of this paragraph, the term "depository institution" means—

(i) any insured bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(ii) any mutual savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(iii) any savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(iv) any insured credit union as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752);

(v) any member as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422); and

(vi) any insured institution as defined in section 408 of the National Housing Act (12 U.S.C.1730a).

(B) This paragraph shall not apply to any such deposit, account, or obligation which is payable only at an office of an insured bank, as defined in section 3 of the Federal Deposit Insurance Act, located in the Commonwealth of Puerto Rico.

(b)(1) Except as provided in paragraphs (2) and (3), the provisions of subsection (a)(1) shall apply to any loan, mortgage, credit sale, or advance made in any State on or after April 1, 1980.

(2) Except as provided in paragraph (3), the provisions of subsection (a)(1) shall not apply to any loan, mortgage, credit sale, or advance made in any State after the date (on or after April 1, 1980, and before April 1, 1983) on which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, which states ex-

plicitly and by its terms that such State does not want the provisions of subsection (a)(1) to apply with respect to loans, mortgages, credit sales, and advances made in such State.

(3) In any case in which a State takes an action described in paragraph (2), the provisions of subsection (a)(1) shall continue to apply to—

(A) any loan, mortgage, credit sale, or advance which is made after the date such action was taken pursuant to a commitment therefor which was entered during the period beginning on April 1, 1980, and ending on the date on which such State takes such action; and

(B) any loan, mortage, or advance which is a rollover of a loan, mortgage, or advance, as described in regulations of the Federal Home Loan Bank Board, which was made or committed to be made during the period beginning on April 1, 1980, and ending on the date on which such State takes any action described in paragraph (2).

(4) At any time after the date of enactment of this Act, any State may adopt a provision of law placing limitations on discount points or such other charges on any loan, mortgage, credit sale, or advance described in subsection (a)(1).

(c) The provisions of subsection (a)(1) shall not apply to a loan, mortgage, credit sale, or advance which is secured by a first lien on a residential manufactured home unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board. Such regulations shall—

(1) include consumer protection provisions with respect to balloon payments, prepayment penalties, late charges, and deferral fees;

(2) require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances);

(3) require that upon prepayment in full, the debtor shall be entitled to a refund of the unearned portion of the precomputed finance charge in an amount not less than the amount which would be calculated by the actuarial method, except that the debtor shall not be entitled to a refund which is less than $1; and

(4) include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required.

(d) The provisions of subsection (c) shall not apply to a loan, mortgage, credit sale, or advance secured by a first lien on a residential manufactured home until regulations required to be issued pursuant to paragraphs (1), (2), and (3) of subsection (c) take effect, except that the provisions of subsection (c) shall apply in the case of such a loan, mortgage, credit sale, or advance made prior to the date on which such regulations take effect if the loan, mortgage, credit sale, or advance includes a precomputed finance charge and does not provide that, upon prepayment in full, the refund of the unearned portion of the precomputed finance charge is in an amount not less the amount which would be calculated by the actuarial method, except that the debtor shall not be entitled to a refund which is less than $1. The Federal Home Loan Bank Board shall issue regulations pursuant to the provisions of paragraphs (1), (2), and (3) of subsection (c) that shall take effect prospectively not less than 30 days after publication in the Federal Register and not later than 120 days from the date of enactment of this Act.

(e) For the purpose of this section—

(1) a "prepayment" occurs upon—

(A) the refinancing or consolidation of the indebtedness;

(B) the actual prepayment of the indebtedness by the consumer whether voluntarily or following acceleration of the payment obligation by the creditor; or

(C) the entry of a judgment for the indebtedness in favor of the creditor;

(2) the term "actuarial method" means the method of allocating payments made on a debt between the outstanding balance of the obligation and the precomputed finance charge pursuant to which a payment is applied first to the accrued precomputed finance charge and any remainder is subtracted from, or any deficiency is added to, the outstanding balance of the obligation;

(3) the term "precomputed finance charge" means interest or a time price differential within the meaning of sections 106(a)(1) and (2) of the Truth in Lending Act (15 U.S.C. 1605(a)(1) and (2)) as computed by an add-on or discount method; and

(4) the term "residential manufactured home" means a mobile home as defined in section 603(6) of the National Mobile Home Construction and Safety Standards Act of 1974 which is used as a residence.

(f) The Federal Home Loan Bank Board is authorized to issue rules and regulations and to publish interpretations governing the implementation of this section.

(g) This section takes effect on April 1, 1980.

APPENDIX H

12 C.F.R. § 590.4(h):

Notice before repossession, foreclosure, or acceleration. (1) Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. Such notice, shall be sent by registered or certified mail with return receipt requested. In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as described above. The debtor is not entitled to notice of default more than twice in any one-year period.

(2) The notice in the following form shall state the nature of the default, the action the debtor must take to cure the default, the creditor's intended actions upon failure of the debtor to cure the default, and the debtor's right to redeem under state law.

TO: _____

DATE: _____, 19____.

_____

_____

NOTICE OF DEFAULT AND RIGHT TO CURE DEFAULT

Name, address, and telephone number of creditor _____

Account number, if any _____

Brief identification of credit transaction _____

_____

You are now in default on this credit transaction. You have a right to correct this default within 30 days from the postmarked date of this notice.

If you correct the default, you may continue with the contract as though you did not default. Your default consists of: _____
Describe default alleged _____

Cure of default: Within 30 days from the postmarked date of this notice, you may cure your default by (describe the acts necessary for cure, including, if applicable, the amount of payment required, including itemized delinquency or deferral charges).

_____

_____

Creditor's rights: If you do not correct your default in the time allowed, we may exercise our rights against you under the law by (describe action creditor intends to take).

_____

If you have any questions, write (the creditors) _____ at the above address or call (creditor's designated employee)_____ at (telephone number) _____ between the hours of _____ and _____ on (state days of week) _____.

If this default was caused by your failure to make a payment or payments, and you want to pay by mail, please send a check or money order, do not send cash.

[45 FR 43686, June 30, 1980, as amended at 45 FR 46341, July 10, 1980; 45 FR 50556, July 30, 1980]

RETAIL INSTALMENT CONTRACT

Customer (which also means "debtor" and includes all purchasers jointly and severally) has today purchased from Secured Party, hereinafter called "Seller", on a deferred payment price basis, under the terms and provisions on the face and back of this Security Agreement, hereinafter called "contract", and accepted in its present condition, the following property.

ACCOUNT NO. _____ DATE 6-27-91

NEW OR USED	YEAR AND MAKE OF MOBILE HOME	SERIES NAME (Also Title # if applicable)	LENGTH	WIDTH	COLOR	IDENTIFICATION NO (Serial No.)
New	1991 Liberty	Liberty	68'2"	24'/8'	Black	021406 [illegible]

EQUIPMENT INCLUDED

☐ Air Cond. Unit(s) ☒ Range ☒ Refrigerator ☐ Freezer ☐ Washer ☐ Dryer
☒ Furniture (As per Mfg. floor plan) ☐ Awnings ☐ Skirting ☐ Acc. Shed ☐ Other _____

PROPERTY TO BE KEPT AT	COUNTY OF	# or other than Customer's address, enter location →	NUMBER AND STREET, CITY, STATE AND ZIP CODE
	Aiken		Same

	CUSTOMER Name	Number and Street	City, State and Zip Code	ZIP CODE
CUSTOMER	Arthur Quiller and Lillie Mae Quiller	Rt. 2 Box 476	North Augusta, South Carolina	29841

	CREDITOR (SELLER) Name	Number and Street	City, State and Zip Code	ZIP CODE
CREDITOR	Vintage Enterprises Inc. DBA/ Colonial Mobile Homes Inc.	1951 Gordon Hwy.	Augusta, Georgia	

CREDITOR (ASSIGNEE) | BARCLAYSAMERICAN/CREDIT, INC. (SEE ASSIGNMENT BELOW)

INSURANCE AGAINST LIABILITY FOR BODILY INJURY OR PROPERTY DAMAGE TO OTHERS IS NOT INCLUDED IN THIS TRANSACTION.

INSURANCE

The purchase of Credit Life or Credit Life and Credit Accident & Health Insurance is not required. Customer, however, having first examined the cost of said insurance, as indicated herein, does voluntarily elect to purchase the following coverages:

☐ Single Decreasing Credit Life Insurance (item 6d) for term of contract on One Customer
signing at a Cost of $_____

☐ Joint Decreasing Credit Life Insurance (item 6d) for term of contract on Both Customers
signing at a Cost of $_____

☐ Credit Accident and Health Insurance (item 6e) for term of contract on First Customer
signing at a Cost of $_____

(Credit Accident and Health Insurance can be purchased only if same form of Credit Life Insurance is elected.) Any insurance elected above will cover only the individual or individuals named in the certificate or policy of insurance.

Dated _____ (to be completed by Customer)

Signature of Customer to be insured under either form of Credit Life Insurance and also under Credit Accident and Health Insurance (if elected)

Signature of co-insured Customer (if Single Life authorized) or co-insured under Joint Life Credit Life Insurance (but only if Joint Life authorized)

(NOTE: If insurance is desired, all Customers must authorize.)

CANCELLATION: Customer may, within **30** days after receipt of the policies or certificates of insurance, cancel all (but not part) of credit life and credit accident and health insurance or credit disability insurance elected above by returning all credit life and credit accident and health insurance certificates received in connection with this contract to the Assignee (the contract and having all parties obligated on the contract agree in writing to such cancellation. Upon cancellation, the cost of such insurance shall be refunded or credited to the account.

Customer has the right to choose the agent or company through which Property or Physical Damage Insurance (items 6f and 6g) is to be obtained. The total cost of such insurance, if obtained through Seller, is $ 1,339.20 for a term of 12 months from the date hereof.

IF PHYSICAL DAMAGE INSURANCE NOT INCLUDED HEREIN, CUSTOMER HAS PURCHASED SAME FROM

William H. McCormack
(Agent's Name)
Atlanta Georgia
(Agent's Address)
American Modern Homes
(Name of Insurance Company)

1. Cash Price (including sales tax)	$ 19[illegible].30
2. Cash Downpayment N/A	$ 1332.30
Trade-in: Year & Make _____	
Allowance: Gross $_____ Amt. Owing $_____ Net	$ .00
Amount owing on trad-in to be paid by ☐ Seller ☐ Customer	
Total Downpayment	$ 1332.30
3. Unpaid Balance of Cash Price (item (1) minus item (2))	$ 18[illegible].00
4. Fees Disbursed by Seller For Customer:	
a. Title Fee $_____ b. License Fee $_____ (Sum of items (4a) and (4b))	$ .00
5. Unpaid Balance of Cash Price Plus Fees Disbursed by Seller (Sum of items (3) and (4)) (Proceeds to Seller) →	$ 1[illegible].30
6. Other Charges:	
a. Recording Fee Title & UCC1	$ 7.00
b. Documentary Stamps	$ .00
c. Other Fees (Describe) _____	$ .00
d. Credit Life Insurance Premium	$ .00
e. Accident & Health Insurance Premium	$ .00
f. Other Ins. Premium (Describe) PI	$ 432.00
g. Physical Damage Insurance Premium for the following coverages and for a term of _____ months:	$ _____
☐ Comprehensive Coverage ☐ Secured Interest Protection	
☐ Comprehensive Personal Liability ☐ Natural Disaster Protection	
☐ Personal Effects ☐ Other (Describe) _____	
Total Other Charges (Sum of items (6a), (6b), (6c), (6d), (6e), (6f) and (6g))	$ [illegible]
7. Unpaid Balance/Amount Financed (Sum of items (3) and (6))	$ 16[illegible]
8. **FINANCE CHARGE**	$ 31[illegible]
ANNUAL PERCENTAGE RATE: 18.50 %	
9. Total of Payments (Sum of items (7) and (8))	$ 47[illegible]
10. Deferred Payment Price (Sum of items (1), (4), (6) and (9))	$ 51611.20

DATE FINANCE CHARGE BEGINS TO ACCRUE if Different from Date of Contract: _____, 19____
(If a date inserted here, this is the estimated delivery date of the property.)

SCHEDULE OF PAYMENTS

Customer agrees to pay Total of Payments (item 9 above) in _____ monthly instalments as follows:

(Check one block only)

☒ A first instalment of $ 263.43

☐ A final instalment of $ _____

☐ A final instalment consisting of a BALLOON PAYMENT of $ _____
(Insert as a BALLOON PAYMENT if the amount of the last instalment is more than twice the amount of any regularly scheduled equal instalment.) A BALLOON PAYMENT may be refinanced only upon such terms and conditions as the then parties to the contract may agree as of its due date.

AND

☒ 190 instalments of $ 263.43 each, all instalments payable the 1st date (or if no like date, then on last day) of each successive month beginning 7-27- 19 91, or if no date is specified, one month after the date of the contract. If unequal, irregular or other than monthly instalment(s) are shown below, they shall be made in addition to the instalments shown above or, if no instalments are shown above, such unequal or irregular payments shall be controlling as to the manner of payment.

$_____ on _____, 19____ $_____ on _____, 19____

$_____ on _____, 19____ $_____ on _____, 19____

*If an asterisk (*) appears beside any unequal, irregular or other than monthly instalments, such payment is a BALLOON PAYMENT, which may be refinanced as stated above for a final instalment BALLOON PAYMENT.

DELINQUENCY CHARGE: If an installment is in default 15 days or more, the Holder may charge and collect a delinquency charge not to exceed 5% of the installment or $5, whichever is less. Upon such delinquency, Holder may, subject to any notice of right to cure, accelerate the unpaid balance of the contract, in which event the unpaid balance, less the rebate of Finance Charge described below and rebate of any unearned insurance premiums included in this transaction, is due and payable. In connection with such delinquency, acceleration, or any repossession, Holder may collect reasonable attorney's fees (15% if not prohibited by law), if referred to an attorney not a salaried employee of Holder, and court costs.

PREPAYMENT: CUSTOMER HAS THE RIGHT TO PREPAY IN FULL OR IN PART THE UNPAID BALANCE OF THIS CONTRACT AT ANYTIME WITHOUT PENALTY. Upon prepayment in full, Customer shall be entitled to a rebate of the unearned portion of the Finance Charge, computed by the actuarial method, except that no rebate of less than $1 will be given.

SECURITY INTEREST: Holder (meaning Seller or its assignee if the contract is assigned) is granted and shall retain a security interest and lien interest in the following described property to secure this transaction and any renewal, extension or refinancing (NOTE: Applicable only if marked):

☒ 1. A purchase money security interest, pursuant to the Uniform Commercial Code and in accordance with the Security Agreement set forth on the reverse side, in the above described property and all equipment, tires, accessories, parts, radios, televisions, furniture, appliances and attachments now or later attached to it, but only if such constitute accessions under the Uniform Commercial Code, and the proceeds of the foregoing (all referred to in the Security Agreement on the reverse side as "Collateral").

☐ 2. A Deed to Secure Debt (or Mortgage) lien on Customer's real property located at the above address on which the above described property will be placed (or if on a different address, real property located at _____).
This lien interest is evidenced by a Deed to Secure Debt (or Mortgage), a copy of which is attached hereto and made a part hereof.

☒ 3. The proceeds of any physical damage insurance covering the Collateral, the proceeds of any credit life or credit accident and health insurance selected by the Customer, and returned or unearned premiums of such insurance.

☒ 4. Customer's execution of this agreement constitutes a waiver of Customer's personal property and homestead exemption rights to the personal and real property herein described.

CUSTOMER AGREES TO ABIDE BY THE TERMS OF THE SECURITY AGREEMENT ON THE REVERSE SIDE.

Customer, having been quoted both a deferred payment price and a cash price, has elected to buy the property for the above stated deferred payment price.

NOTICE TO THE BUYER: DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO AN EXACT COPY OF THE CONTRACT YOU SIGN.

Accepted: The foregoing contract is hereby assigned under the terms of the assignment on the reverse side to the following Creditor:

BARCLAYSAMERICAN/CREDIT, INC.
917 REYNOLDS STREET
AUGUSTA, GEORGIA 30902

Ventace Enterprises Inc. DBA/
[illegible] Mobile Homes, Inc.

By _____ Title _____

CUSTOMER ACKNOWLEDGES RECEIPT OF A COPY OF THIS CONTRACT WHICH WAS COMPLETELY FILLED IN PRIOR TO CUSTOMER'S EXECUTION HEREOF.

_____ CUSTOMER

_____ CUSTOMER

CONSENT TO DEED TO SECURE DEBT (OR MORTGAGE) INTEREST

In consideration of Seller's entering into this transaction with Customer, the undersigned hereby consents to the Deed to Secure Debt (or Mortgage) interest on the real property described above and agrees to sign a Deed to Secure Debt (or Mortgage) to evidence this consent.

_____ WITNESS _____ SIGNATURE

_____ WITNESS _____ SIGNATURE

Form No. 8809-SM (GA.) (3-81) (Mobile Home Only)
PERSONAL PRESUMPTION CONTRACT

SEE REVERSE SIDE FOR ADDITIONAL INFORMATION

ORIGINAL — FILE IN FIREPROOF FILE CABINET

NOTICE OF PROPOSED LIFE AND CREDIT ACCIDENT AND HEALTH INSURANCE

Credit life and credit accident and health insurance is included in this transaction only if a charge therefor is set forth herein, as indicated in the "Insurance" section on the reverse side, subject to acceptance by the insurer, The Citadel Life Insurance Company, P. O. Box 31488, Charlotte, North Carolina 28231 (for credit life and credit accident and health insurance on Motor Vehicle and Recreational Vehicle Contracts), or Paramost Life Insurance Company, P. O. Box 2450, Grand Rapids, Michigan 49501 (for credit life insurance on all Mobile Home Contracts and Recreational Vehicle Contracts if the total of payments shown on the reverse side exceeds $10,000), as applicable. The amount of premiums and the type of insurance purchased are set out on the reverse side in the "Insurance" section. Such insurance will cover only the individual(s) designated and agreeing as insured in the "Insurance" section set forth on the reverse side, such agreement(s) characterizing signed acceptance by such individual(s) of this notice. The term of such insurance will commence as of the date the indebtedness is incurred and will be the same as the term of the indebtedness, which is set forth on the reverse side. The amount of credit life insurance will pay Holder (creditor) the amount of indebtedness, if any, owing at the time of death subject to a maximum amount under the applicable group policy of $20,000 (The Citadel Life Insurance Company) or $30,000 (Paramost Life Insurance Company), as applicable. The amount of credit accident and health insurance will pay Holder monthly benefits in installments equivalent to the monthly payments required under the contract for the term of any disability covered by the policy, subject to a maximum amount of the smaller of either the initial amount of indebtedness (total of payments shown on reverse side) or $10,000 under the group policy. All such insurance proceeds will be applied to reduce or discharge the indebtedness. If insurance is declined by the insurer or otherwise does not become effective, any premium therefor will be credited or paid to the individual(s) entitled thereto and if insurance is terminated prior to the scheduled maturity date of the indebtedness, any premium refund due will be credited or paid promptly to the individual(s) entitled thereto, the refund being computed in accordance with the refund formulas on file with the state Insurance Department. In order to induce insurer to effect any such insurance, the individual(s) desiring such coverage declares to the best of his knowledge and belief that he is now in good health and he authorizes any physician or hospital to disclose to insurer, in the event of his death or disability, all information concerning his death or disability as well as his medical history prior to the date of this transaction. All the foregoing is subject to all terms, conditions and provisions of the policies or certificates to be issued.

SECURITY AGREEMENT

The Collateral shall be at Customer's risk and Customer shall procure and maintain for the term hereof insurance against all physical damage risks of Customer's expense in such form and for such amounts as Holder may require, the proceeds thereof to be payable as interest shall appear, with mortgagee's loss payable clause attached. Holder may, as creditor of Customer, purchase such insurance effective thereafter, although nothing herein contained shall impose a duty upon Holder to do so. Customer will reimburse Holder for the actual cost of such insurance to the extent that the same is not included in the deferred payment price, the amount of such reimbursement together with a Finance Charge at the highest lawful rate, to be paid in equal installments over the remaining term concurrently with the remaining unpaid installments set forth above, and to constitute an additional obligation of Customer hereunder. Customer hereby assigns to Holder any moneys not in excess of the unpaid balance hereunder which may become payable under such and other insurances, including return or unearned premiums, and directs any insurance company to make payments directly to Holder to be applied to said unpaid balance and appoints Holder as attorney in fact to endorse any draft in the event of any default under this contract. Holder is authorized to cancel said insurance and credit any premium refund received against said unpaid balance.

Customer agrees: to pay promptly all taxes and assessments upon the Collateral and for its use or operation and on this contract; to keep the Collateral in good condition and free from liens, libels, claims or charges of any kind; that all equipment, tires, accessories, parts, radios, and attachments installed on or affixed to the Collateral shall, as defined by the Uniform Commercial Code, become part of the Collateral by accession; not to sell, encumber or abandon the Collateral or use it for hire, charter or illegally; not to remove or attempt to remove said Collateral from the county and state given above as Customer's address without notifying Holder in writing and not remove the Collateral from the continental United States without the Holder's express written consent to keep and maintain the Collateral as personal property only and not to allow it to become part of any freehold; to send notice by registered mail to Holder after repossession but before resale of the Collateral if Customer claims that any articles not included herein were contained in the Collateral at the time of repossession, failure to do so being a waiver of and bar to any subsequent claim therefor. Any notice to Customer shall be sufficiently given if mailed to the address of Customer hereof herein.

Time is of the essence. Holder may collect a delinquency and collection charge on each instalment in default for 15 days or more in an amount not exceeding 5% of each said instalment of $5, whichever is less. If Customer defaults on any obligation under this contract, or if Holder shall consider the indebtedness or the Collateral insecure, the full balance may, upon election of Holder without notice, subject to any notice of right to cure, become due and payable, less the required rebate of the Finance Charge, and rebate of any unearned insurance premiums included in this transaction, together with reasonable attorney's fees (15% if not prohibited by law) if this contract is referred for collection to an attorney, plus court costs. Customer agrees in any such case to pay said amount or, at Holder's election, to deliver the Collateral to Holder, and Holder may, without notice or demand for performance or legal process, peaceably enter any premises, but not into any dwelling, where the Collateral may be found, peaceably take possession of it and custody of anything found in it. Upon default, Holder shall have all of the remedies of a secured party under the Uniform Commercial Code. The Collateral may be sold, leased or otherwise disposed of with or without notice publicly or privately, with or without having the Collateral at the sale, and Holder may require the Collateral at any such disposition. The proceeds of disposition less all expenses of retaking, storing, repairing and selling, and to the extent permitted by applicable law, attorney's fees and legal expenses incurred by the Holder shall be credited to the unpaid balance due hereunder. Customer is liable for, and shall forthwith pay any deficiency; any surplus shall be paid to Customer. It is agreed that sale to a dealer is a commercially reasonable method of disposition, and that if prior notice to Customer of a sale or other intended disposition of the Collateral is required, 5 days' notice to Customer is reasonable notice.

If Seller assigns this contract, Seller shall not be assignee's agent for transmission of payments or for any purpose.

Waiver of any default or acceptance of any past due payment shall not be a waiver of any subsequent or any other default. Holder's rights and remedies hereunder are cumulative. If any part of this contract is invalid, unenforceable or inconsistent with the applicable laws or regulations of the State of Seller's address herein, such part shall be deemed amended, modified or deleted to conform thereto.

No change in this contract shall be binding unless in writing and no agreement, representation or warranty shall be binding on the Holder unless expressly contained herein.

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

GUARANTY

In consideration of the acceptance of the instrument on the reverse side hereof, or its purchase by any assignee, we jointly and severally guarantee to any Holder the payment promptly when due of every instalment thereunder and the payment on demand of the entire unpaid balance and all other obligations of Customer thereunder, including reasonable attorney's fees, if Customer defaults in any payment of any instalment at its due date or in any other manner, without first requiring Holder to proceed against Customer. We warrant that the contract is genuine, legally valid and enforceable and waive notice of acceptance hereof and of default thereunder and consent that Holder may, without affecting our liability, compromise or release, by operation of law or otherwise, any rights against and grant extensions of time of payment to Customer and other obligors. If we default on any obligation under this Guaranty and Holder refers the same to an attorney for collection, we shall also be liable to and pay Holder attorney's fees (15% of the amount in default, if not prohibited by law), court costs and disbursements. Witness our hands and seals.

CORPORATE GUARANTOR

_____ (SEAL)
NAME OF GUARANTOR

BY _____
TITLE

INDIVIDUAL GUARANTOR

_____ (SEAL)
NAME

_____ (SEAL)
NAME

TERMS OF SELLER'S ASSIGNMENT

We hereby sell and assign the contract on the reverse side and all interest in the property described on the front hereof, together with any Deed to Secure Debt (or Mortgage) given as security for this contract, and our rights under any guaranty to Assignee shown on the front hereof (hereinafter called "you") without recourse as to Customer's obligation of payment, except as may be otherwise provided in any underlying agreement between us, with full power to you in your or our name to collect and discharge the same and to take all such legal or other proceedings as we might take, save for this assignment. We warrant that the contract, Deed of Secure Debt (or Mortgage) and any guaranty are genuine, legally valid and enforceable; we have complied with all disclosure requirements imposed by the applicable Federal and State Laws and Regulations; we have complied with all applicable Federal and State Laws and Regulations relating to the contract and the establishment of the contract and any Deed to Secure Debt (or Mortgage) given as security hereto; we hereby convey good title thereto; all statements of facts therein are true, the Customer was quoted the cash price and the deferred payment price as stated therein, no part of the down payment shown as paid in cash is owing by loan or note and any trade-in shown was received by us for the allowance stated therein; all statements made by Customer on any forms related thereto are true to our knowledge and belief; we have clear title to the property, free of all liens and encumbrances, except for this contract; any Deed to Secure Debt (or Mortgage) taken as security for this contract has been duly recorded and is a first lien or encumbrance on the property described, except as expressly noted therein. Customer is not a minor and has capacity to contract; Certificate of Title showing the first lien or encumbrance in your favor has been or will be forthwith obtained. with the lien thereon perfected as of the date of the contract, if permitted by law. We further warrant and agree to abide by all agreements, warranties or guaranties, either express, implied or required by law, afforded Customer relative to the property described on the front hereof. All warranties herein contained are made to induce you to purchase this contract and if there is a breach of any, or if Customer withholds payment, as required under the contract, because Customer alleges a claim, defense or set-off against us, without regard to your or our knowledge or lack of knowledge with respect thereto or your reliance thereon, we will on demand purchase the contract from you for the balance then remaining unpaid, plus any and all costs and expenses paid or incurred in respect thereto; in addition, if Customer recovers any amounts from you as a result of such claim, we will reimburse you for such amounts paid to Customer. We waive all demands and notice of default and consent that, without notice to us, you may extend time to or compound or release, by operation of law or otherwise, any rights against Customer or any other obligor. If we execute any guaranty covering this transaction, the words "without recourse as to Customer's obligation of payment" are deemed deleted, and, notwithstanding the provisions of any underlying agreement whatsoever between us, your recourse as to us on this assignment shall be as stated in such guaranty. If we do not execute any such guaranty and have no underlying agreement with you governing our assignment to you of contracts for the type of chattel here sold, then notwithstanding anything in this assignment, this contract shall be deemed sold to you, as to recourse, with our assignment to you in your standard full recourse form.

(See other side for Seller's signature to assignment)

Form No. 8069-GA (GAL) (3-69)
Mobile Home Order
FEDERAL PREEMPTION CONTRACT

APPENDIX J

Letter dated October 28, 1982 from:

Federal Home Loan Bank Board
1700 G. Street, N.W.
Washington, D.C. 20552

to:

D. Edwin Schmelzer, Esq.
Witkowski, Weiner, McCaffrey
& Brodsky, P.C.
Suite 350
1575 Eye Street, N.W.
Washington, D.C. 20005

Dear Mr. Schmelzer:

This responds to your letter of October 7 requesting an interpretation of Board regulation section 590.4(h) (12 C.F.R. § 590.4(h) (1982)), which contains consumer protection requirements relating to the financing of manufactured homes and preempts state usury laws if those requirements are met. The sole issue presented by your letter is whether section 590.4(h) requires that a manufactured home credit agreement recite the purchaser's right to thirty days' notice as a condition of preemption of state usury laws.

Paragraph (h)(1) of section 590.4 states, in relevant part:

> Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in subparagraph (h)(2) of this section.

This requirement refers only to the act of giving notice; neither paragraph (h) nor the Congressional legislation that it implements (Depository Institutions Deregulation and

Monetary Control Act of 1980, Pub. L. No. 96-221, § 501, 94 Stat. 161-63 (1980)) expressly requires that a covered credit agreement recite the purchaser-borrower's right to notice. Furthermore, there are no legislative or regulatory history materials suggesting that either Congress or the Board intended an implicit requirement of a contractual notice provision. If a contractual notice provision requirement had been intended, it is reasonable to assume that the Board would have expressly so provided, as it did in paragraphs (d) (prepayment without penalty), (e) (terms of balloon payments), (f) (late charges), and (g) (agreements for deferral of fees) of section 590.4. In light of these considerations, it is the view of this Office that section 590.4(h) does not require that the terms of a manufactured home credit sale agreement recite the purchaser's right to thirty days' notice of acceleration or repossession.

Please feel free to contact this Office if you should have further questions.

Sincerely,

/s/ Thomas P. Vartanian

THOMAS P. VARTANIAN
General Counsel

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

On Appeals From The United States District Court
For The Southern District of Georgia

ARTHUR QUILLER,
et al.

Plaintiff-Appellants,

v.

BARCLAY AMERICAN/
CREDIT, INC.

Defendant-Appellee.

CASE NO. 83-8455

JACK GRANT, JR. AND
EVEVYN H. GRANT,

Plaintiff-Appellants,

v.

GENERAL ELECTRIC
CREDIT CORPORATION,

Defendant-Appellee.

CASE NO. 83-8456

BRIEF OF AMICUS CURIAE
FEDERAL HOME LOAN BANK BOARD

OF COUNSEL:

Ralph W. Christy
Acting General Counsel

Harvey Simon
Associate General Counsel

John E. Gunther
Deputy Director
Litigation Division

James T. Lantelme
Trial Attorney

Federal Home Loan
Bank Board

STATEMENT REGARDING PREFERENCE

These cases are not entitled to preference in processing or disposition.

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I. INTEREST OF THE FEDERAL HOME LOAN BANK BOARD AND STATEMENT OF THE CASE

The Federal Home Loan Bank Board ("Board") is an independent federal regulatory agency created in 1932 under the Federal Home Loan Bank Act, 12 U.S.C. §§ 1421 *et seq.*, and has the authority under the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 161 (1980) (the "Act") (codified at 12 U.S.C. § 1735f-7 note), to interpret regulations that it promulgates concerning federally-related loans and mortgages secured by first liens on residential manufactured housing.

Plaintiff-appellants in *Quiller v. Barclays American/Credit, Inc.*, Case No. 83-8455 ("Barclays"), and *Grant v. General Electric Credit Corporation*, Case No. 83-8456 ("GECC"), have raised issues concerning the interpretation of two Board regulations promulgated under the Act: 12 C.F.R. § 590.4(d), concerning the disclosure in a manufactured housing credit agreement, of a borrower's right to prepay without penalty, and 12 C.F.R. § 590.4(h), concerning notice that must be given before a lender may repossess, foreclose, or accelerate the loan.[1]

The Board is interested in this litigation because it is authorized under the Act to publish interpretations governing its implementation, 12 U.S.C. § 1735f-7 note (f), and because the Board desires that judicial construction of Board regulations be consistent with the agency's intent in adopting the regulations. The United States Supreme Court in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980), has held that an agency's interpretation of its own regulations should be accorded "substantial deference" by a reviewing court unless the interpretation is "demonstrably

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[1] The Board has been informed that these two regulations are at issue not only in the *Barclays* and *GECC* cases but also in the case of *Moyer v. Citicorp Homeowners, Inc.*, No. CV 183-93 (S.D. Ga. Aug. 23, 1983), *appeal docketed*, No. 83-2085 (11th Cir.).

irrational." The Board submits this amicus brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure which grants agencies of the United States the right to file amicus briefs without first obtaining the consent of the parties or leave of the Court.[2]

II. STATEMENT OF THE ISSUES

Due to the potential impact of these cases upon the manufactured housing lending industry and due to the Board's responsibility to regulate various aspects of that industry, the Board respectfully submits this *amicus* brief addressed solely to the following two issues: (1) What disclosure of a borrower's right to prepay without penalty must be made under Board regulation by a lender in its manufactured home credit agreement as a condition of federal preemption of state usury laws; and (2) whether the Board's regulation requires a manufactured home credit agreement to recite the borrower's right to thirty-days notice before acceleration, repossession, or foreclosure as a condition of federal preemption of state usury laws.

III. SUMMARY OF ARGUMENT

Plaintiff-appellants have contended that alleged violations of two of the Board's consumer protection regulations require that the defendants in *Barclays* and *GECC* lose the usury preemption granted by federal statute for the transactions at issue. The Board's General Counsel has issued opinions concerning both regulations and the opinions are in accord with the District Court rulings, dismissing the plaintiff-appellants' cases for failure to state a claim. The interpretations of the Board's regulations are to be ac-

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[2] The Board deeply regrets that because it only learned of the pendency of these cases quite recently, it was unable to file this brief in a more timely manner and apologizes for any inconvenience that this filing may cause. However, the Board believes that these cases present very important issues impacting greatly on the Board's regulatory scheme and feels compelled to make its views on these issues known to the Court.

corded substantial deference by this Court unless they are demonstrably irrational. Because the interpretations are reasonable, the plaintiff-appellants' arguments that the district court rulings should be reversed because of their different interpretation of the Board's regulations should be rejected by this Court.

IV. JURISDICTION

This Court has jurisdiction from final orders of the U.S. District Court for the Southern District of Georgia pursuant to 28 U.S.C. § 1291.

V. ARGUMENT AND CITATION OF AUTHORITIES

Under the Act, state usury limits on loans secured by first liens on residential manufactured homes are preempted as long as the loans are made in conformance with the Board's consumer protection regulations with respect to, *inter alia*, prepayment penalties and foreclosure notices both of which are at issue herein. 12 U.S.C. § 1735f-7 note (a)(1), (c) and (d); 12 C.F.R. §§ 590.3 and .4.

We demonstrate below that the lower court's opinions should be affirmed because they are consistent with the Board's interpretation of its regulations.

A. The Lower Court Opinions Should Be Affirmed Because They Are Consistent With The Board's Interpretation Of 12 C.F.R. § 590.4(d).

The Board's regulation at 12 C.F.R. § 590.4(d) (1980) states that "the right to prepay shall be disclosed in type larger than that used for the body of the document." The Board's General Counsel has issued an opinion stating the intent of the Board in promulgating its regulation concerning type-size for the disclosure required by section 590.4(d). Appendix A ("Opinion").

Briefly, the Board was requested by defendants in *Moyer v. Citicorp Homeowners, Inc.*, (p. 1, *supra*), to issue an opinion regarding its interpretation of the requirements under 12 C.F.R. § 590.4(d). In *Moyer*, a question arose as to the sufficiency of a disclosure made by Citicorp Homeonwers, Inc. in its residential manufactured housing credit agreements. The credit agreements in question disclosed the prepayment rights in boldface type with initial letters of all but a few words in the upper case. The type in question, although larger than most of the other type on the page, was not the largest type above the signature line. The issue presented was whether the consumer's right to prepay the outstanding balance of a loan was properly disclosed in a type larger than that used for the body of the document in accordance with section 590.4(d).

The Opinion concluded that such disclosure is proper under section 590.4(d) because the type was, in fact, larger than the type in the body of the document in that it was in boldface, each letter being printed in lines thicker than those of the letters used in the body of the contract and because most of the initial letters of the words in the notice were capitals, unlike the initial letters of words appearing in the body of the document which were capitalized infrequently.[3] The Opinion points out that the regulatory provision does not require a specific type, nor does it require that the debtor's prepayment right be disclosed in type larger than that used for all other notices or provisions.

As originally promulgated, section 590.4(d) required that the right to prepay disclosure be "conspicuously" printed on the loan document. The Board received comments that the word "conspicuous" had been litigated in connection with a requirement of Federal Reserve Regulation Z (12 C.F.R. 226.8(b)), and that such "conspicuousity" requirement "might give rise to questions whether the print must

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[3] Words are capitalized in the body of the document only if beginning a sentence or if they begin terms such as "Buyer" or "Seller."

be as large as, same as, or larger than that required by Regulation Z." 45 Fed. Reg. 43684 (June 30, 1980). The Board considered this comment and agreed that the "conspicuousity" requirement "may be potentially troublesome" and, therefore, changed the requirement "so that type-size larger than that used in the body of the loan document may be used to call attention to this provision." *Id.*

Nowhere in either the Board's regulations or the Act is there any requirement that the type-size be the largest above the signature line. The Board deliberately promulgated section 590.4(d) to avoid the ambiguity of the word "conspicuous" and foreclose comparison with type-sizes of potentially competing disclosures such as Federal Reserve Regulation Z.

In light of the Opinion, a review of the Barclays and GECC credit agreements reveals that the disclosures required by section 590.4(d) are proper and meet the criterion of the section. The Barclays credit agreement disclosure meets the section 590.4(d) criterion because it is in boldface and is in a type-size larger than that in the body of the document. The GECC credit agreement disclosure meets the section 590.4(d) criterion because it is in a type-size larger than that in the body of the document.

B. The Lower Court Opinions Should Be Affirmed Because They Are Consistent With The Board's Interpretation of 12 C.F.R. § 590.4(h)(1)

Plaintiff-appellants also contend that neither Barclays or GECC qualify for the federal usury preemption for their residential manufactured housing loans because neither credit agreement contains notice of the debtor's right to 30-day notice before repossession, foreclosure or acceleration upon default and right to cure the default. However, this argument is directly at odds with the Board General Counsel's October 28, 1982, interpretation of the applicable Board regulation. Appendix B ("Opinion II"). The Board's

regulation concerning notice before repossession, foreclosure, or acceleration says —

> Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. Such notice shall be sent by registered or certified mail with return receipt requested. In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as described above. The debtor is not entitled to notice of default more than twice in any one-year period.

12 C.F.R. § 590.4(h)(1) (1980).

Opinion II states that the requirements of section 590.4(h) only referred to the *act* of giving notice. Opinion II further points out that neither paragarph (h) nor the Congressional legislation that it implements, 12 U.S.C. § 1735f-7 note (1980), expressly requires that a covered credit agreement recite the purchaser-borrower's right to notice. Furthermore, Opinion II highlights the fact that there are no legislative or regulatory history materials suggesting that either Congress or the Board intended an implicit requirement of a contractual notice provision. Opinion II reasons that if a contractual notice provision requirement had been intended, it is reasonable to assume that the Board would have expressly so provided, as it did in paragraphs (d) (prepayment without penalty), (e) (terms of balloon payments), (f) (late charges), and (g) (agreements for deferral of fees) of section 590.4.

In light of the enormous potential liabilities that would result from the loss of the federal usury preemption, the

Board believes that the only requirements that a lender under section 590.4(h) must reasonably be expected to be aware of and follow are those explicitly set forth in the regulation or the Act. It is clear that section 590.4(h) does not require either explicitly or implicitly that the terms of a manufactured home credit sale agreement recite the purchaser's right to a thirty-days' notice of acceleration, repossession, or foreclosure or the right to cure the default.

VI. CONCLUSION

The Board believes that the General Counsel's interpretation of the Board's two regulations, 12 C.F.R. §§ 590.4(d) and (h) are correct and in accord with the Board's intent. Because the interpretations certainly are reasonable (and not "demonstrably irrational") they should be accorded "substantial deference" and are dispositive of the issues concerning the regulations raised by plaintiff-appellants in *Barclays* and *GECC*. Because plaintiff-appellants' arguments are directly inconsistent with the opinions of the Board's General Counsel and with the Board's intent, this Court should reject plaintiff-appellants' arguments and uphold the district court's dismissal of these suits on these two issues.

Dated: November 30, 1983 Respectfully submitted,

Of Counsel:

Ralph W. Christy
Acting General Counsel

/s/ Harvey Simon
HARVEY SIMON
Associate General Counsel

/s/ John E. Gunther
JOHN E. GUNTHER
Deputy Director
Litigation Division

/s/ James T. Lantelme
JAMES T. LANTELME
Trial Attorney

Federal Home Loan Bank
Board
1700 G Street, N.W.
Washington, D.C. 20552
(202) 377-6420

CERTIFICATE OF SERVICE

I certify that on November 30, 1983, I mailed a copy of the Brief of Amicus Federal Home Loan Bank Board to the following attorneys for the parties in these cases.

David E. Hudson Esq.
P.O. Box 1564(13)
Augusta, Georgia 30913

John B. Long, Esq.
1500 Georgia Railroad Bank Building
Augusta, Georgia 30910

Thomas W. Tucker, Esq.
P.O. Box 2426
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Douglas N. Campbell
Mitchell, Loggins, Campbell & Elsberry
The Equitable Bldg. No. 950
100 Peachtree St.
Atlanta, Ga. 30303

/s/ James T. Lantelme
JAMES T. LANTELME

APPENDIX A

November 30, 1983

D. Edwin Schmelzer, Esq.
Witkowski, Weiner, McCaffrey
& Brodsky, P.C.
Suite 350
1575 Eye Street, N.W.
Washington, D.C. 20005

Dear Mr. Schmelzer:

This is in response to your letter of August 11, 1983, in which you request an interpretation of a regulatory provision issued by the Federal Home Loan Bank Board ("Board"): paragraph (d), "Prepayment penalties" of 12 C.F.R. § 590.4 (1983), "Consumer protection rules for federally-related loans, mortgages, credit sales and advances secured by first liens on residential mobile homes."

You have asked whether a particular retail installment sales contract used by your client, Citicorp Acceptance Company, meets the regulatory standard. This question has arisen in connection with litigation involving the contract, in which a major issue is whether the prepayment disclosure notice meets the requirements of section 590.4(d). The prepayment notice appears in two places. The first is a sentence in boldface type, and the initial letters of all but a few of the words of the sentence are in the upper case. This sentence appears in the upper left hand corner of the contract in the fourth line of print from the top and reads: "Buyer May Prepay the Unpaid Balance on this Contract in Whole or in Part at Any Time Without Penalty." The consumer's right to prepay is also stated as a paragraph in the body of the contract following the boldface caption "Prepayment Rebate." The specific issue you have asked us to address is whether the consumer's right to prepay the outstanding balance of a loan has been properly disclosed in accordance with 12 C.F.R. § 590.4(d). Paragraph (d) pro-

vides as follows: "[T]he right to prepay [the outstanding balance of a loan] shall be disclosed in the loan contract in type larger than that used for the body of the document."

Based on my review of the documents in question, I offer the following observations.

The regulatory provision does not by its terms require a specific type, nor does it require that the debtor's prepayment right be disclosed in type larger than that used for all other notices or provisions in the document. Nor does the provision require by its terms that where there are multiple notices of the right to prepay all such notices must be larger than the body.

The first notice of prepayment rights is, in fact, in type larger than that used for the body of the document in that (1) the type is boldface, each letter being printed in lines thicker than those of the letters used in the body of the contract, and (2) most of the initial letters of the words appearing in the first notice are capitalized, unlike the initial letters of words appearing in the body of the contract, which are capitalized only if beginning a sentence or if they begin significant terms such as "Buyer" or "Seller." The second notice of prepayment, following the caption "Prepayment Rebate," is not disclosed in type larger than that used for the body of the document, although the caption is larger.

Based on the foregoing, it is my opinion that the subject document meets the criterion of paragraph (d) of section 590.4.

Sincerely

/s/ Ralph W. Christy
RALPH W. CHRISTY
Acting General Counsel

APPENDIX B

October 28, 1982

D. Edwin Schmelzer
Witkowski, Weiner, McCaffrey
and Brodsky, P.C.
Suite 350
1575 Eye Street, N.W.
Washington, D.C. 20005

Dear Mr. Schmelzer:

This responds to your letter of October 7 requesting an interpretation of Board regulation section 590.4(h) (12 C.F.R. § 590.4(h) (1982)), which contains consumer protection requirements relating to the financing of manufactured homes and preempts state usury laws if those requirements are met. The sole issue presented by your letter is whether section 590.4(h) requires that a manufactured home credit agreement recite the purchaser's right to thirty days' notice as a condition of preemption of state usury laws.

Paragraph (h)(1) of section 590.4 states, in relevant part:

> Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in subparagraph (h)(2) of this section.

This requirement refers only to the act of giving notice; neither paragraph (h) nor the Congressional legislation that it implements (Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 501, 94 Stat. 161-63 (1980)) expressly requires that a covered credit agreement recite the purchaser-borrower's right to notice. Furthermore, there are no legislative or regulatory history materials suggesting that either Congress or the Board in-

tended an implicit requirement of a contractual notice provision. If a contractual notice provision requirement had been intended, it is reasonable to assume that the Board would have expressly so provided, as it did in paragraphs (d) (prepayment without penalty), (e) (terms of balloon payments), (f) (late charges), and (g) (agreements for deferral of fees) of section 590.4. In light of these considerations, it is the view of this Office that section 590.4(h) does not require that the terms of a manufactured home credit sale agreement recite the purchaser's right to thirty days' notice of acceleration or repossession.

Please feel free to contact this Office if you should have further questions.

Sincerely,

/s/ Thomas P. Vartanian
THOMAS P. VARTANIAN
General Counsel

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

On Appeals From The United States District Court
For The Southern District of Georgia

ARTHUR QUILLER,
et al.

Plaintiff-Appellants,

v.

BARCLAYS AMERICAN/
CREDIT, INC.

Defendant-Appellee.

CASE NO. 83-8455

JACK GRANT, JR. AND
EVELYN H. GRANT,

Plaintiff-Appellants,

v.

GENERAL ELECTRIC
CREDIT CORPORATION,

Defendant-Appellee.

CASE NO. 83-8456

BRIEF ON REHEARING OF AMICUS CURIAE FEDERAL HOME LOAN BANK BOARD BEFORE THE EN BANC PANEL

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STATEMENT REGARDING PREFERENCE

These cases are not entitled to preference in processing or disposition.

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I. INTEREST OF THE FEDERAL HOME LOAN BANK BOARD AND STATEMENT OF THE CASE

The Federal Home Loan Bank Board ("Board") is an independent federal regulatory agency created in 1932 under the Federal Home Loan Bank Act, 12 U.S.C. §§ 1421 *et seq.*, and has the authority under the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 161 (the "Act") (codified at 12 U.S.C. § 1735f-7 note (1980)), to promulgate regulations concerning federally-related loans and mortgages secured by first liens on residential manufactured housing. The Board is also expressly authorized by the Act to interpret those regulations. *Id.*

Plaintiff-appellants ("Borrowers") in *Quiller v. Barclays American/Credit, Inc.*, Case No. 83-8455 and *Grant v. General Electric Credit Corporation*, Case No. 83-8456, both in their initial appeal briefs and their briefs submitted to the *en banc* panel, have raised issues concerning the interpretation of two Board regulations promulgated under the Act: (1) 12 C.F.R. § 590.4(h), concerning notice that must be given before a lender may repossess, foreclose, or accelerate on a loan in default, and (2) 12 C.F.R. § 590.4(d), concerning the disclosure in a manufactured housing credit agreement of a borrower's right to prepay without penalty.[1] The failure of a creditor to follow the Board's consumer protection regulations results in loss of the federal usury preemption.

These cases concern the attempts by Barclays American/Credit, Inc. ("Barclays") and General Electric Credit Corp. ("GECC") to foreclose on the Borrowers' mobile-homes secured by first-liens held by Barclays and GECC. The Bor-

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[1] These two regulations are at issue not only in the *Barclays* and *GECC* cases but also in the case of *Moyer v. Citicorp Homeowners, Inc.*, No. CV 183-93 (S.D. Ga. Aug. 23, 1983), *appeal docketed*, No. 84-8166 (11th Cir. Feb. 27, 1984).

rowers brought these suits before the District Court for the Southern District of Georgia to challenge those actions by Barclays and GECC. The Borrowers claimed, *inter alia*, that the loans allegedly in default were usurious because the credit agreement forms used by Barclays and GECC were in violation of the Act and the Board's consumer protection regulations and thus were not covered by the federal usury preemption.

The District Court for the Southern District of Georgia dismissed both cases for failure to state a claim.[2] A panel of this Court, however, decided that because certain provisions of the contract forms in question concerning acceleration of unpaid debt and repossession were, in its opinion, "inconsistent" with the terms of one of the Board's consumer protection regulations concerning notice upon default, the contracts on their face violate one of the Board's consumer protection regulations and thus the contracts lose the usury preemption granted by the Act for the transactions at issue. Barclays and GECC petitioned for a rehearing *en banc* of these cases. On May 22, 1984, the Court vacated the panel's decision and granted rehearing *en banc*.[3]

The Board has an interest in this litigation because it is authorized under the Act to publish interpretations governing its implementation, 12 U.S.C. § 1735f-7 note (f), and because the Board desires that judicial construction of Board regulations be consistent with the agency's intent in adopting the regulations. This is of particular importance in these cases where the panel has written opinions that, while

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[2] The Board expresses no view on the accuracy of the facts alleged in either of these cases. The Board's role is solely to provide the Court with the Board's interpretation of its own regulations.

[3] For the convenience of the Court, when referring to the vacated opinions, this brief shall cite to the cases as published in the Federal Reporter 2d. *Quiller v. Barclays American/Credit*, 727 F.2d 1067 (11th Cir. 1984) *vacated, rehearing granted* (May 22, 1984), and *Grant v. General Electric Credit Corp.*, 727 F.2d 1073 (11th Cir. 1984) *vacated, rehearing granted* (May 22, 1984).

purporting to defer to the Board's interpretation of its regulations, reach a result that is not consonant with the statute or regulations.

The Board has resubmitted its *amicus* brief already on file with the panel at the request of the *en banc* panel and submits this *amicus* brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure.

II. STATEMENT OF THE ISSUES

(1) Whether a form contract for a loan secured by a first lien on a residential mobile home must have a contractual provision stating that a debtor has the right to 30-day notice of default and right to cure.

(2) Whether a lender who in fact provides to a borrower all of the rights to notice of default and right to cure required by the Act nevertheless cannot qualify for usury preemption because a provision of its form contract might be read by some borrowers as not guaranteeing such rights to the borrower.

The Board submits that the answer to both questions should be "no".

III. SUMMARY OF ARGUMENT

The Act and regulation do not require inclusion of a clause explaining the borrower's right to notice of default and right to cure in the contract. The regulation generally requires that notice be given on default in order for a creditor to exercise its rights to accelerate, foreclose or repossess. However, this notice need not be given until such time as the creditor wishes to take such actions against a debtor. The panel agreed with this proposition.

Borrowers' argument that the acceleration provisions in the contracts are inconsistent with the consumer protections provided by the Act, and that usury preemption is unavailable where the contract contains such an inconsistency, must fail. While the contracts at issue here contain lan-

guage authorizing foreclosure on less than 30-days notice, the contracts also qualify the creditor's remedies by expressly preserving any rights to notice the debtor may possess. The Act and regulation permit acceleration, foreclosure and repossession without notice in certain circumstances. Therefore the alleged "inconsistency" between the contracts and the consumer protection provided by the Act is illusory. To require more explicit, contractual notice would mean requiring the very notice the Board has determined need not be placed in the contract.

In any event, the Board's regulation concerning notice of default and right to cure looks to the actions taken by creditors. Whether or not the notice is given in the contract, if the creditor fails to give the Board prescribed notice upon certain debtor defaults, the usury preemption is lost. Thus, the Board's regulation ensures that the creditor must *in fact* provide to the borrower any rights required by the Act if the borrower wished to take advantage of usury preemption. The regulation achieves the twin purposes of the Act: ensuring the availability of credit to relatively low income borrowers and providing certain protections to such borrowers in the event of default.

IV. JURISDICTION

This Court has jurisdiction of appeals from final orders of the U.S. District Court for the Southern District of Georgia pursuant to 28 U.S.C. § 1291.

V. ARGUMENT AND CITATION OF AUTHORITIES

Under the Act, state usury limits on loans secured by first liens on residential manufactured homes are preempted as long as the remedies used by a creditor are in conformance with the Board's consumer protection regulations with respect to, *inter alia*, foreclosure notices and prepayment penalties. 12 U.S.C. § 1735f-7 note (a)(1), (c) and (d); 12 C.F.R. § 590.3(a) and 590.4(b).

The Board demonstrates below that the Borrowers are incorrect in their claims that certain provisions of the Barclays and GECC contracts were inconsistent with the Board's regulations.

A. The Contracts' Provisions On Their Face Are Not Inconsistent With The Board's Regulation.

The Borrowers have contended that on their face both credit agreements violate the provisions of the Act and regulation concerning a debtor's right to 30-day notice of default and right to cure, 12 U.S.C. § 1735f-7 note (c)(2) and 12 C.F.R. § 590.4(h), and the regulation concerning disclosure of a debtor's right to prepayment, 12 C.F.R. § 590.4(d).

The Borrowers' arguments under these regulations, upon analysis, can be reduced to three questions: (1) does the Act or regulations require a full disclosure in the contract or a debtor's right to 30-day notice of default and right to cure under the Act and 12 C.F.R. § 590.4(h); (2) do the contracts' terms concerning acceleration and foreclosure upon default contradict the debtor's rights under the Act and 12 C.F.R. § 590.4(h), and therefore disqualify the transactions for federal usury preemption; and (3) does the type size of the contracts violate the requirements of the Board's prepayment notice regulation, 12 C.F.R. § 590.4(d)?[4]

1. *Neither the Act nor the regulation requires a contractual provision concerning a debtor's right to 30-day notice of default and right to cure.*

As the Board has stated in its *amicus* brief at pp. 6-8 submitted previously to the panel, neither the Act, 12 U.S.C. § 1735f-7 note (c)(2), nor the Board's implementing

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[4] The Board considers the Barclays and GECC contracts' prepayment notices to be within the requirement of section 590.4(d) for the reasons set forth in the argument and letter opinion of the Office of the General Counsel contained in the Board's brief filed with the panel and resubmitted to the *en banc* panel. The Board readopts that brief.

regulation, 12 C.F.R. § 590.4(h)(1), requires contracts to contain a provision setting out the borrower's right to 30-day notice of default and right to cure. The Act leaves it to the Board to decide how best to implement the provisions of the Act, requiring only that "the terms and conditions of such loan . . . comply with consumer protection provisions prescribed by the . . . Board." 12 U.S.C. § 1735f-7 note (c). The Board's regulation does not require such a provision. If the Board had intended a contractual notice provision requirement, the Board would have expressly so provided, as it did in sections 590.4(d) (prepayment without penalty), (e) (terms of balloon payments), (f) (late charges), and (g) (agreements for deferral of fees). *See* the letter of the Board's General Counsel attached as Exhibit B to the Board's *amicus* brief submitted previously to the panel.

The Board has consistently interpreted its regulations as not requiring contractual disclosure. The Board's interpretation of its regulations is "dispositive" so long as the Board's view of its own regulation is not "demonstrably irrational". *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). The panel agreed that the Board's interpretation was controlling and that disclosure of the rights to notice of default and cure was not required in the contract. *Quiller*, 727 F.2d at 1070-71; *Grant*, 727 F.2d at 1074.

2. *The qualified provisions of the contracts concerning acceleration and foreclosure are not inconsistent with the Board's regulation.*

The Borrowers claim that the provisions in the contracts concerning immediate declarations of default and acceleration are contrary to the rights provided to borrowers by the Act, and that GECC and Barclays are disqualified from obtaining usury preemption. The panel advanced this argument as the basis for its holdings in *Quiller*, 727 F.2d at 1072, and *Grant*, 727 F.2d at 1075. This analysis by the Borrowers and the panel is incorrect.

The language at issue in the Barclays contract is as follows:

> If Customer defaults on any obligation under this contract, or if Holder shall consider the indebtedness or the Collateral insecure, the full balance may, upon election of Holder, without notice, subject to any notice of right to cure, become due and payable, less the required rebate of the Finance Charge. . . . Customer agrees in any such case to pay said amount or, at Holder's election, to deliver the Collateral to Holder, and Holder may, without notice or demand for performance or legal process, peaceably take possession of it and custody of anything found in it.

The language in the GECC contract is as follows:

> The Grants' contract provides in part: In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the FINANCE CHARGE designated as Time Price Deferential calculated by the Pro-Rata Method provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right. . . .

Contract language providing for immediate declarations of default and acceleration is not necessarily contrary to the Act and the implementing regulation. Both the Act and the regulation specifically provide for circumstances in which a creditor may in fact act without notice. Overlooked by the Borrowers are the qualifications in the full text of the Act and the regulation. The Act merely requires that the Board issue a regulation that requires "a 30-day notice prior to instituting any action leading to repossession or foreclosure (*except in the case of abandonment or other extreme circumstances*)" 12 U.S.C. § 1735f-7 note (c)(2) (emphasis added). The text of the implementing regulation says that

> *Except in the case of abandonment or other extreme circumstances*, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section.
>
> * * *
>
> *The debtor is not entitled to notice of default more than twice in any one-year period.*

12 C.F.R. § 590.4(h)(1) (emphasis added).

Thus there are three separate circumstances in which a creditor may in fact accelerate, repossess or foreclose without giving the section 590.4(h) notice: (1) abandonment; (2) other extreme circumstances; and (3) upon the debtor's third default in a one-year period. Neither the GECC nor the Barclays contract claims an unqualified right to immediate acceleration, repossession and foreclosure without notice. Both contracts are expressly qualified by any right the borrower may have to notice of right to cure. Whether a debtor is entitled to notice depends on the circumstances surrounding the alleged default. Therefore, the contracts do not controvert the protections of the Act.

Borrowers, and the panel, rely primarily on *General Finance Corp. of Georgia v. Sprouse*, 577 F.2d 989 (5th Cir. 1978), to support this "inconsistency" argument. In the *Sprouse* case, the Fifth Circuit replaced the traditional rules of contract construction with a stricter standard based on state court interpretations of the Georgia Industrial Loan Act, Ga. Code Ann. §§ 7-3-1 *et seq.* (1982) ("GILA"). *Id.* at 993. The court found that because the promissory note and security agreement in question did not together make the full disclosure concerning acceleration required under the GILA, the agreement as a whole was in violation of the GILA. The court then imposed the statutory sanction: loss of principal and accrued interest. *Id.* at 993-94.

Sprouse is a case interpreting state law and is neither controlling nor relevant to the interpretation of the federal statute and regulation at issue here. Moreover, the *Sprouse* decision actually undercuts Borrowers' arguments. Unlike the Barclays and GECC contracts, the contract clause in *Sprouse* did not contain any qualifying language. The court cited *Bragg v. Household Finance Corp.*, 140 Ga. App. 75, 230 S.E.2d 55 (1976), to distinguish the contract at issue in *Sprouse* from contracts that did contain qualifying clauses. *Sprouse*, 577 F.2d at 993-994. Regarding the *Bragg* contract, the Fifth Circuit stated that

> the limitation clause "less any required refund of interest," was "not as clear nor as concise as it might be," 230 S.E.2d at 57, but it nonetheless was more than sufficient to put the debtor on notice that certain interest charges would be refundable under law.

Id. at 994 n.4.

Thus, *Sprouse's* favorable citation of *Bragg* in explicating its ruling clearly demonstrates that these contracts should not be interpreted as contrary to the Act.

Application of the *Sprouse* "average consumer" standard of contract construction to the Act would harm the goals of the Congress in adopting the Act. Preemption was plainly thought essential to assure the availability of financing to relatively low-income mobile home buyers. The penalties for usury are often severe. The "average consumer" test would create great uncertainty among lenders. It would be impossible to know whether particular contract language might be considered too vague or inconsistent with the Act by a particular jury or trial court. Therefore, Borrowers' proposed standard, if adopted by this Court, could seriously reduce the availability of financing to low-income borrowers. This result would be particularly unfair because the Board's guidance to lenders has been that such contractual disclosures are not required. Moreover, such a draconian result is not required to achieve Congress' other goal — providing certain protections to debtors under the Act. Re-

gardless of contract language, a lender cannot qualify for usury preemption if it does not *in fact* provide to borrowers the rights required by the Act.

3. *The Board's regulation protects borrowers by requiring lenders who wish to qualify for usury preemption to afford them all the rights provided by the Act and regulation.*

As discussed in the Board's *amicus* brief filed earlier with the panel, section 590.4(h) does not require contractual notice. The section does, however, require that such notice of default and right to cure be given before a creditor may accelerate, repossess or foreclose (except in the circumstances previously discussed). The regulation prescribes the *act* of giving notice and the form the notice must take. This is a significant right of debtors that must be observed for the federal usury preemption to continue to apply.

The Borrowers have claimed that this is not a right of the debtor under Georgia law unless the right to notice is spelled out in the contract. Borrower's analysis is totally incorrect because a *federal* statute that preempts state law is at issue here. If, in fact, a court finds that the prescribed notice under section 590.4(h) was not provided to the debtor, then the creditor loses its federal preemption of the state usury law. The debtor then has available the full panoply of rights and remedies under the applicable state usury statute.[5]

VI. CONCLUSION

The Board's interpretations of its regulations, 12 C.F.R. §§ 590.4(d) and (h), are correct and in accord with Congres-

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[5] Allegations are made that Barclays has given a defective section 590.4(h) notice. If true, Barclays would lose its federal preemption. The court must decide whether under the Federal Rules of Civil Procedure such alleged facts should be considered on a review of a motion to dismiss.

sional intent concerning their applicability to the contracts at issue in these cases. The *interpretations are not* "demonstrably irrational" and are to be dispositive of the issues concerning whether the contracts qualify on their face for federal preemption under the Act. The central issue for this Court to resolve is whether Borrowers have properly pleaded a failure by GECC or Barclays to *in fact* provide them the notices required by the Act and regulation.

Respectfully submitted,

Dated: July 20, 1984

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CERTIFICATE OF SERVICE

I certify that on July 20, 1984, I mailed a copy of the Brief On Rehearing Of Amicus Federal Home Loan Bank Board Before The En Banc Panel to the following Attorneys for the parties in these cases.

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APPENDIX M

IN THE SUPERIOR COURT OF RICHMOND COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE NO. 9195-C

ARTHUR QUILLER, LILLIE MAE QUILLER, AND ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

vs.

BARCLAYS AMERICAN/ CREDIT, INC.

Defendant.

COMPLAINT

NOW COME Arthur Quiller, Lillie Mae Quiller, and all other persons similarly situated, and bring this their Complaint against Defendant and show:

1. Defendant, Barclays American/Credit, Inc., is a North Carolina corporation with a place of business being located in Richmond County, Georgia, at 917 Reynolds Street, Augusta, Georgia, and is subject to the jurisdiction of this Court.

CLASS ACTION ALLEGATIONS

2. Plaintiffs bring this action on behalf of themselves and all other persons similarly situated as a class action pursuant to Rule 23 of the Georgia Civil Practice Act, O.C.G.A. § 9-11-23. The persons constituting this class are so numerous as to make it impractical to bring all of them before the Court. Plaintiffs will fairly insure the adequate representation of all members of this class. The character of the rights sought to be enforced for the class is several and the object

of the action is the adjudication of claims which do or may affect specific property involved in this action.

3. The class consists of all individuals who meet the following criteria:

(a) Individuals who have within four (4) years of the filing of this action, purchased new mobile homes or new manufactured homes; and

(b) Individuals who have, in connection with the purchase of said mobile homes or manufactured homes, entered into retail instalment contracts on a form similar to that form contract entered into between the named Plaintiffs, Arthur Quiller and Lillie Mae Quiller, and Vintage Enterprises Inc., which contracts did not specify that the purchasers were entitled to a thirty (30)-day notice prior to instituting any action leading to repossession or foreclosure; and

(c) Individuals who have, in connection with the financing of said new mobile homes or new manufactured homes, been charged a finance charge which is in excess of 10% add-on; and

(d) Individuals who have had said contract assigned by the seller of said mobile homes or manufactured homes to the Defendant, Barclays American/Credit, Inc.

4. The named Plaintiffs, on or about the 27th day of June, 1981, entered into a Retail Instalment Contract with Vintage Enterprises Inc., in connection with the purchase of a new 1981 Liberty Mobile Home, all as more fully appears from a copy of said contract attached hereto and marked Exhibit "A", by reference made a part hereof.

5. Said contract is governed by the provisions of the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30, et seq.

6. Said contract was subsequently assigned by Vintage Enterprises Inc. to Defendant, Barclays American/Credit, Inc.

7. In connection with the sale of said new 1981 Liberty Mobile Home, and in connection with the financing thereof, the Defendant, Barclays American/Credit, Inc., wilfully violated the provisions of the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30, et seq., by charging a finance charge which amounts to in excess of a 13% add-on rate when the provisions of the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-33(a), limit the finance charge to a 10% add-on rate.

8. The Retail Instalment Contract used by Defendant, Barclays American/Credit, Inc., in connection with this transaction and in connection with the transactions entered into with the unnamed members of this class, does not specifically provide that the buyers, the named Plaintiffs and all other persons similarly situated, are entitled to a thirty (30)-day notice prior to instituting any action leading to repossession or foreclosure.

9. By failing to so specifically provide for said thirty (30)-day notice in said contract, the provisions of Public Law 96-221, Title V, § 501, March 31, 1980, 94 Stat. 161, paragraph A(1) are not applicable to this transaction and the provisions of the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30, et seq., govern this transaction.

10. The Defendant has wilfully and intentionally charged excessive charges to the named Plaintiffs, Arthur Quiller and Lillie Mae Quiller, and all other persons similarly situated, and have wilfully and intentionally violated the provisions of the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-33.

11. Plaintiffs are entitled to a declaratory judgment declaring that Defendant is barred from the recovery of any finance charges, delinquency charges or collection charges in connection with the contract held by the Defendant and in connection with the contracts entered into with the members of Plaintiffs' class and held by Defendant, and Plaintiffs are entitled to a judgment declaring that all pay-

ments being made on those contracts are to be applied toward the unpaid balance of the purchase price and not for any finance, delinquency or collection charges.

12. The named Plaintiffs and all other persons similarly situated are entitled to a judgment against the Defendant for wilfully violating the provisions of the Georgia Motor Vehicle Sales Finance Act in an amount equal to double the time price differential and any delinquency charge and any attorneys' fees and court costs charged and paid with respect to said transaction.

13. In connection with the named Plaintiffs, the named Plaintiffs are entitled to a judgment in the amount of $63,834.80.

14. The named Plaintiffs believe that Defendant has similarly overcharged in excess of one hundred individuals who are similarly situated to the named Plaintiffs.

15. The named Plaintiffs are fearful that Defendant may attempt to foreclose against members of the class because of alleged defaults when in fact there would be no alleged defaults if payments had been applied only toward the reduction of the principal debt or unpaid balance as opposed to the reduction of the total of payments.

16. If the Defendant repossesses any such mobile home unit from any member of this class, the members of this class will suffer irreparable injury and harm.

17. The named Plaintiffs and all other persons similarly situated are entitled to a temporary restraining order and preliminary injunction restraining and preliminarily enjoining the Defendant from proceeding with any non-judicial foreclosure or repossession of any mobile home unit from the members of Plaintiffs' class, without prior judicial supervision from this Court.

19. The unnamed Plaintiffs do not have an adequate remedy at law to stop any possible non-judicial foreclosure pending the conclusion of this action.

20. Pending the resolution of this action, the Defendant will be collecting monthly payments from the members of this class and, the Defendant should be temporarily restrained and preliminarily enjoined from collecting any such monthly payments on any such tainted Georgia Motor Vehicle Sales Finance Act contract and the named Plaintiffs and the unnamed members of this class should be authorized to make payments into the registry of this Court pending final resolution of this action, or, the Defendant should be required to post a bond or such other security to ensure the named Plaintiffs and unnamed members of this class will be able to recover any funds currently being paid by them to the Defendant on any such afflicted Mobile Home Retail Instalment Contract.

WHEREFORE, Plaintiffs, pray that:

(a) The Court certify this action as a class action pursuant to Rule 23 of the Georgia Civil Practice Act, O.C.G.A. § 9-11-23.

(b) The Court enter a declaratory judgment declaring that the Defendant is barried from collecting any finance charges from the named Plaintiffs and all other persons similarly situated, in connection with their Georgia Mobile Home Retail Instalment Sales contracts.

(c) The named Plaintiffs recover from the Defendant an amount equal to double the time price differential, or $62,844.80, for the Defendant's wilful violation of the Georgia Motor Vehicle Sales Finance Act, and the unnamed members of Plaintiffs' class similarly receive damages against the Defendant in an amount equal to double the time price differential as a result of the Defepnant's wilful violation of the provisions of the Georgia Motor Vehicle Sales Finance Act.

(d) The Defendant be temporarily restrained and preliminarily enjoined from non-judicially foreclosing or repossessing any mobile home from any members of Plaintiffs' class, without prior approval of this Court, and the Defen-

dant be temporarily restrained and preliminarily enjoined from continuing to collect monthly payments on any such tainted Georgia Motor Vehicle Sales Finance Act contracts and that the Court allow the named Plaintiffs and unnamed members of Plaintiffs' class to make monthly payments into the registry of this Court pending final resolution of this action, or that the Court require the Defendant to post adequate security or require Defendant to take such other action to insure the Court that the Defendant will be entitled to respond to any claims for damages under O.C.G.A. § 10-1-38(c).

(e) The named Plaintiffs and all other persons similarly situated be granted such other relief as is just and equitable.

/s/ Jay M. Sawilowsky
JAY M. SAWILOWSKY
902 Georgia Railroad Bank Bldg.
Augusta, GA 30901

/s/ John B. Long
JOHN B. LONG
1500 Georgia Railroad Bank Bldg.
Augusta, GA 30910

ATTORNEYS FOR PLAINTIFFS

STATE OF GEORGIA

COUNTY OF RICHMOND VERIFICATION

PERSONALLY APPEARED before the undersigned attesting authority, Arthur Quiller and Lillie Mae Quiller, who having been duly sworn, state that they have read the attached and foregoing Complaint and that the allegations contained therein are true.

This 16 day of February, 1983.

/s/ Arthur Quiller
ARTHUR QUILLER

SWORN TO, and subscribed before me
this 16 day of February, 1983.

/s/ Jay M. Sawilowsky
JAY M. SAWILOWSKY
Notary Public
Richmond County, Georgia

/s/ Lillie Mae Quiller
LILLIE MAE QUILLER

SWORN TO, and subscribed before me
this 16 day of February, 1983.

/s/ Jay M. Sawilowsky
JAY M. SAWILOWSKY
Notary Public
Richmond County, Georgia

BEST AVAILABLE COPY

RETAIL INSTALMENT CONTRACT

Customer (which also means "debtor" and includes all purchasers jointly and severally) has today purchased from Secured Party, hereinafter called "Seller," on a deferred payment price basis, under the terms and provisions on the face and back of the Security Agreement, hereinafter called "contract" and accepted in its present condition, the following property.

ACCOUNT NO. _____

DATE 6-27-81

NEW OR USED	YEAR AND MAKE OF MOBILE HOME	SERIES NAME (Use No. if applicable)	LENGTH	WIDTH	COLOR	IDENTIFICATION NO. (Serial No.)
New	[illegible]	[illegible]	[illegible]		[illegible]	0021805XAB

EQUIPMENT INCLUDED — 21.66 — 0021805XAB

☐ Air Cond. Unit(s) ☐ Range ☐ Refrigerator ☐ Freezer ☐ Washer ☐ Dryer

☐ Furniture (As per Mfg. floor plan) ☐ Awnings ☐ Skirting ☐ Acc. Shed ☐ Other _____

PROPERTY TO BE KEPT AT	COUNTY OF	If at other than Customer's address, enter location →	NUMBER AND STREET, CITY, STATE AND ZIP CODE
CUSTOMER(S) Name	Arthur [illegible] and Billie [illegible]	CREDITOR (Seller) Name	[illegible] Enterprises Inc. DBA Colonial Mobile Homes Inc.
Number and Street	Rt. # [illegible]	Number and Street	[illegible] Gordon Hwy.
City, State and Zip Code	North [illegible] ZIP CODE	City, State and Zip Code	[illegible], Georgia ZIP CODE

CREDITOR ASSIGNS: BARCLAYSAMERICAN/CREDIT, INC. (SEE ASSIGNMENT BELOW)

INSURANCE AGAINST LIABILITY FOR BODILY INJURY OR PROPERTY DAMAGE TO OTHERS IS NOT INCLUDED IN THIS TRANSACTION.

INSURANCE

The purchase of Credit Life or Credit Life and Credit Accident & Health Insurance is not required. Customer, however, having first examined the cost of said insurance, as indicated herein, does voluntarily elect to purchase the following coverages:

☐ Single Decreasing Credit Life Insurance (item 6d) for term of contract on One Customer

signing as a Cost of $ _____

☐ Joint Decreasing Credit Life Insurance (item 6d) for term of contract on Both Customers

signing as a Cost of $ _____

☐ Credit Accident and Health Insurance (item 6e) for term of contract on First Customer

signing as a Cost of $ _____

(Credit Accident and Health Insurance can be purchased only if same form of Credit Life Insurance is elected.) Any insurance elected above will cover only the individual or individuals named in the certificate or policy of insurance.

_____ (Insured) (to be completed by Customer)

_____ Signature of Customer to be insured under other form of Credit Life Insurance and also under Credit Accident and Health Insurance (if elected)

_____ Signature of non-insured Customer (if Single Life authorized) or co-insured under joint Credit Life Insurance (but only if Joint Life authorized)

(NOTE: If insurance is desired, all Customers must execute.)

CANCELLATION: Customer may, within 30 days after receipt of the policies or certificates of insurance, cancel all (but not part) of credit life and credit accident and health insurance or credit life insurance elected above by returning all credit life and credit accident and health insurance certificates received in connection with this contract to the Assignee of this contract and having all parties obligated on this contract agree in writing to such cancellation. Upon cancellation, the cost of such insurance shall be refunded or credited to the account.

Customer has the right to choose the agent or company through which Property or Physical Damage Insurance (Items 6f and 6g) is to be obtained. The total cost of such insurance, if obtained through Seller, is $ 432.00 for a term of _____ months from the date hereof.

IF PHYSICAL DAMAGE INSURANCE NOT INCLUDED HEREIN, CUSTOMER HAS PURCHASED SAME FROM

William H. Kennedy
(Agent's Name)
Atlanta Georgia
(Agent's Address)
American National Insurance
(Name of Insurance Company)

1. Cash Price (including sales tax)	$ 19754.80
2. Cash Downpayment	$ 4191.80
Trade-in: Year & Make _____	
Allowance: Gross $ _____ Amt. Owing $ _____ Net	$ .00
Amount owing on trade-in to be paid by ☐ Seller ☐ Customer	
Total Downpayment	$ 4191.80
3. Unpaid Balance of Cash Price (item (1) minus item (2))	$ 15561.00
4. Fees Disbursed By Seller For Customer:	
a. Title Fee $ _____ b. License Fee $ _____ (Sum of items (4a) and (4b))	$ .00
5. Unpaid Balance of Cash Price Plus Fees Disbursed by Seller (Sum of items (3) and (4)) (Proceeds to Seller) →	$ 15561.00
6. Other Charges:	
a. Recording Fee Title : 0021	$ 7.00
b. Documentary Stamps	$ .00
c. Other Fees (Describe) _____	$ .00
d. Credit Life Insurance Premium	$ .00
e. Accident & Health Insurance Premium	$ .00
f. Other Ins. Premium (Describe) PI	$ 32.20
g. Physical Damage Insurance Premium for the following coverages and for a term of _____ months	$ _____
☐ Comprehensive Coverage ☐ Secured Interest Protection	
☐ Comprehensive Personal Liability ☐ Natural Disaster Protection	
☐ Personal Effects ☐ Other (Describe) _____	
Total Other Charges (Sum of items 6(a), (6b), (6c), (6d), (6e), (6f) and (6g))	$ 439.00
7. Unpaid Balance: Amount Financed (Sum of items (3) and (6))	$ 16000.00
8. **FINANCE CHARGE**	$ 31417.40
ANNUAL PERCENTAGE RATE: 18.50 %	
9. Total of Payments (Sum of items (7) and (8))	$ 47417.40
10. Deferred Payment Price (Sum of items (1), (4), (6) and (8))	$ 51611.20

DATE FINANCE CHARGE BEGINS TO ACCRUE, if Different from Date of Contract _____, 19__
(If a date inserted here, this is the estimated delivery date of the property.)

SCHEDULE OF PAYMENTS

Customer agrees to pay Total of Payments (item 9 above) in _____ monthly instalments as follows:

(Check one box only)

☐ A first instalment of $ _____

☐ A final instalment of $ _____

☐ A final instalment consisting of a BALLOON PAYMENT of $ _____ (Insert as a BALLOON PAYMENT if the amount of the last instalment is more than twice the amount of any regularly scheduled equal instalment.) A BALLOON PAYMENT may be refinanced only upon such terms and conditions as the then parties to the contract may agree on at its due date.

☒ 179 instalments of $ 262.43 each, all subsequent payments payable the 1st day (or if no 1st date, then on last day) of each successive month beginning _____, 19__, or if no date is specified, one month after the date of this contract. If unequal, irregular or other than monthly instalment(s) are shown below, they shall be made in addition to the instalments shown above or, if no instalments are shown above, such unequal or irregular payments shall be controlling as to the manner of payment.

AND

$ _____	on _____, 19__	$ _____	on _____, 19__
$ _____	on _____, 19__	$ _____	on _____, 19__

*If an asterisk (*) appears beside any unequal, irregular or other than monthly instalments, such payment is a BALLOON PAYMENT, which may be refinanced as stated above for a final instalment BALLOON PAYMENT.

DELINQUENCY CHARGE: If an instalment is in default 15 days or more, the Holder may charge and collect a delinquency charge not to exceed 5% of the instalment or $5, whichever is less. Upon such delinquency, Holder may, subject to any notice of right to cure, accelerate the unpaid balance of the contract, in which event the unpaid balance, less the rebate of Finance Charge described below and rebate of any unearned insurance premiums included in this transaction, is due and payable. In connection with such delinquency, acceleration, or any repossession, Holder may collect reasonable attorney's fees (15% if not prohibited by law), if referred to an attorney not a salaried employee of Holder, and court costs.

PREPAYMENT: CUSTOMER HAS THE RIGHT TO PREPAY IN FULL OR IN PART THE UNPAID BALANCE OF THIS CONTRACT AT ANYTIME WITHOUT PENALTY. Upon prepayment in full, Customer shall be entitled to a rebate of the unearned portion of the Finance Charge computed by the actuarial method, except that no rebate of less than $1 will be given.

SECURITY INTEREST: Holder (meaning Seller, or its assignee if this contract is assigned) is granted and shall retain a security interest and lien inferior to the following described property to secure this transaction and any renewal, extension or refinancing (NOTE: Applicable only if marked):

☒ 1. A purchase money security interest, pursuant to the Uniform Commercial Code and in accordance with the Security Agreement set forth on the reverse side, in the above described property and all equipment, tires, accessories, parts, radios, televisions, furniture, appliances and attachments now or later attached to it, but only if such additions, accessions under the Uniform Commercial Code, and the proceeds of the foregoing, all referred to in the Security Agreement on the reverse side as "Collateral"; and

☐ 2. A Deed to Secure Debt (or Mortgage) lien on Customer's real property located at the above address on which the above described property will be placed (or is or will be located on a different address, real property located at _____.

The lien interest is evidenced by a Deed to Secure Debt (or Mortgage), a copy of which is attached hereto and made a part hereof.

☒ 3. The proceeds of any physical damage insurance covering the Collateral, the proceeds of any credit life or credit accident and health insurance referred to by the Contract, returned or unearned premiums of such insurance.

☒ 4. Customer's execution of this agreement constitutes a waiver of Customer's personal property and homestead exemption rights to the personal and real property hereinabove described.

CUSTOMER AGREES TO ABIDE BY THE TERMS OF THE SECURITY AGREEMENT ON THE REVERSE SIDE.

Customer, having been quoted both a deferred payment price and a cash price, has elected to buy the property for the above stated deferred payment price.

NOTICE TO THE BUYER: DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO AN EXACT COPY OF THE CONTRACT YOU SIGN.

Accepted: The foregoing contract is hereby assigned to the Assignee named on the reverse side of this original contract.

BARCLAYSAMERICAN/CREDIT, INC.
613 REYNOLDS STREET

CUSTOMER ACKNOWLEDGES RECEIPT OF A COPY OF THIS CONTRACT WHICH WAS COMPLETELY FILLED IN AT THE TIME OF CUSTOMER'S EXECUTION HEREOF.

☐ Credit Accident and Health Insurance (see 6a. for term of contract on Pint Customer

signing or a Cost of $ _____

(Credit Accident and Health Insurance can be purchased only if same form of Credit Life Insurance is elected.) Any insurance elected above will cover only the individual or individuals named in the certificate or policy of insurance.

Date: _____ (to be completed by Customer)

Signature of Customer to be insured under either form of Credit Life Insurance and also under Credit Accident and Health Insurance (if elected)

Signature of Insurable Customer (if Single Life authorized) or Insurable Joint Life Credit Life Insurance (if only if Joint Life married)

(NOTE: If insurance is desired, all Customers must subscribe.)

CANCELLATION: Customer may, within 30 days after receipt of the policies or certificates of insurance, cancel all (but not part) of credit life and credit accident and health insurance or credit life insurance elected above by returning all credit life and credit accident and health insurance certificates received in connection with this contract to the Assignee of this contract and having all parties obligated on this contract agree in writing to such cancellation. Upon cancellation, the cost of such insurance shall be refunded or credited to the account.

Customer has the right to choose the agent or company through which Property or Physical Damage Insurance (Items 6f and 6g) is to be obtained. The total cost of said insurance, if obtained through Seller, is $ 432.00 for a term of _____ months from the date hereof.

IF PHYSICAL DAMAGE INSURANCE NOT INCLUDED HEREIN, CUSTOMER HAS PURCHASED SAME FROM

William H. McCormick
(Name of Insurance Agent)

Atlanta Georgia
(Agent's Address)

American Modern Homes
(Name of Insurance Company)

DELINQUENCY CHARGE: If an instalment is in default 15 days or more, the Holder may charge and collect a delinquency charge not to exceed 5% of the instalment or $5, whichever is less. Upon such delinquency, Holder may, subject to any notice of right to cure, accelerate the unpaid balance of the contract, in which event the unpaid balance, less the rebate of Finance Charge described below and rebate of any unearned insurance premiums included in this transaction, is due and payable. In connection with such delinquency, acceleration, or any repossession, Holder may collect reasonable attorney's fees (15% if not prohibited by law), if referred to an attorney not a salaried employee of Holder, and court costs.

PREPAYMENT: CUSTOMER HAS THE RIGHT TO PREPAY IN FULL OR IN PART THE UNPAID BALANCE OF THIS CONTRACT AT ANYTIME WITHOUT PENALTY. Upon prepayment in full, Customer shall be entitled to a rebate of the unearned portion of the Finance Charge, as required by the actuarial method, except that no rebate of less than $1 will be given.

SECURITY INTEREST: Holder (meaning Seller, or its assignee if this contract is assigned) is granted and shall retain a security interest and lien interest in the following described property to secure this transaction and any renewal, extension or refinancing (NOTE: Applicable only if marked):

☐ 1. A purchase money security interest, pursuant to the Uniform Commercial Code and in accordance with the Security Agreement set forth on the reverse side, in the above described property and all equipment, tires, accessories, parts, radios, televisions, furniture, appliances and attachments now or later attached to it, but only if such is permissible under the Uniform Commercial Code, and the proceeds of the foregoing (all referred to in the Security Agreement on the reverse side as "Collateral").

☐ 5. A Deed to Secure Debt (or Mortgage) lien on Customer's real property located at the above address on which the above described property will be physically or at a different address, real property located at: _____

This lien interest is evidenced by a Deed to Secure Debt (or Mortgage), a copy of which is attached hereto and made a part hereof.

☐ 3. The proceeds of any physical damage insurance covering the Collateral, the proceeds of any credit life or credit accident and health insurance collected by the Customer, and refunded or unearned premiums of such insurance.

☐ 4. Customer's execution of this agreement constitutes a waiver of Customer's personal property and homestead exemption rights to the personal and real property herein described.

CUSTOMER AGREES TO ABIDE BY THE TERMS OF THE SECURITY AGREEMENT ON THE REVERSE SIDE.

Customer, having been quoted both a deferred payment price and a cash price, has elected to buy the property for the above stated deferred payment price.

NOTICE TO THE BUYER: DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO AN EXACT COPY OF THE CONTRACT YOU SIGN.

Accepted: The foregoing contract is hereby assigned on for the terms of the assignment on the reverse side to the following Creditor.

BARCLAYSAMERICAN/CREDIT, INC.
917 REYNOLDS STREET
AUGUSTA, GEORGIA 30902

Vintage Enterprises Inc. D/B/A
Colonial Mobile Homes Inc.

By: _____ Title: Mgr

CUSTOMER ACKNOWLEDGES RECEIPT OF A COPY OF THIS CONTRACT WHICH WAS COMPLETELY FILLED IN PRIOR TO CUSTOMER'S EXECUTION HEREOF.

Walter Powell
CUSTOMER

Sallie Powell
CUSTOMER

CONSENT TO DEED TO SECURE DEBT (OR MORTGAGE) IN SPOUSE

In consideration of Seller's entering into this transaction with Customer, the undersigned hereby consents to the Deed to Secure Debt (or Mortgage) interest on the real property described above and agrees to sign a Deed to Secure Debt (or Mortgage) to evidence this consent.

WITNESS _____ SIGNATURE _____

WITNESS _____ SIGNATURE _____

SEE REVERSE SIDE FOR ADDITIONAL INFORMATION

ORIGINAL – FILE IN FIREPROOF FILE CABINET

a. Recording Fee $ 2.00
b. Documentary Stamps $ .00
c. Other Fees (Describe) $ .00
d. Credit Life Insurance Premium $ .00
e. Accident & Health Insurance Premium $ .00
f. Other Ins. Premium (Describe) PL $ 432.00
g. Physical Damage Insurance Premium for the following coverages and for a term of _____ months $ _____

☐ Comprehensive Coverage ☐ Secured Interest Protection
☐ Comprehensive Personal Liability ☐ Natural Disaster Protection
☐ Personal Effects ☐ Other (Describe) _____

Total Other Charges (Sum of items (6a), (6b), (6c), (6d), (6e), (6f) and (6g)) $ 439.00
7. Unpaid Balance Amount Financed (Sum of items (3) and (6)) $ 16000.00
8. **FINANCE CHARGE** $ 31812.40
ANNUAL PERCENTAGE RATE: 18.52 %
9. Total of Payments (Sum of items (7) and (8)) $ 47812.40
10. Deferred Payment Price (Sum of items (1), (4), (6) and (9)) $ 51611.20

DATE FINANCE CHARGE BEGINS TO ACCRUE, if Different From Date of Contract _____, 19__
(If a date inserted here, this is the estimated delivery date of the property.)

SCHEDULE OF PAYMENTS

Customer agrees to pay Total of Payments (item 9 above) in _____ monthly instalments as follows:

(Check one block only) ☐ A first instalment of $ 261.43
☐ A final instalment of $ _____
☐ A final instalment consisting of a BALLOON PAYMENT of $ _____
(Insert as a BALLOON PAYMENT if the amount of the last instalment is more than twice the amount of any regularly scheduled equal instalment.) A BALLOON PAYMENT may be refinanced only upon such terms and conditions as the then parties to the contract may agree as of its due date.

☒ 180 instalments of $ 262.43 each, all instalments payable the 7th day of each month, beginning on last day(s) of each successive month beginning 11-7- 19 91, or if no blank is filled in, one month after the date of this contract, if unequal, irregular or other than monthly instalments are shown below, they shall be made in addition to the instalments shown above or, if no instalments are shown above, such unequal or irregular payments shall be controlling as to the manner of payment:

$ _____ on _____, 19__ $ _____ on _____, 19__
$ _____ on _____, 19__ $ _____ on _____, 19__

*If an asterisk (*) appears beside any unequal, irregular or other than monthly instalments, such instalment is a BALLOON PAYMENT, which may be refinanced as stated above for a final instalment BALLOON PAYMENT.

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M-10

NOTICE OF PROPOSED CREDIT LIFE AND CREDIT ACCIDENT AND HEALTH INSURANCE

Credit life and credit accident and health insurance is included in this transaction only if a charge therefor is set forth herein, as indicated in the "Insurance" section on the reverse side, subject to acceptance by the insurer. The Citadel Life Insurance Company, P. O. Box 31488, Charlotte, North Carolina 28231 (for credit life and credit accident and health insurance on Motor Vehicle and Recreational Vehicle Contracts), or Foremost Life Insurance Company, P. O. Box 2450, Grand Rapids, Michigan 49501 (for credit life insurance on all Mobile Home Contracts and Recreational Vehicle Contracts if the total of payments shown on the reverse side exceeds $10,000), as applicable. The amount of premiums and the type of insurance purchased are set out on the reverse side in the "Insurance" section. Such insurance will cover only the individual(s) designated and signing as insured in the "Insurance" section set forth on the reverse side, such signature(s) also constituting signed acceptance by such individual(s) of this notice. The term of such insurance will commence on the date the indebtedness is incurred and will be the same as the term of the indebtedness, which is set forth on the reverse side. The amount of credit life insurance will pay Holder (creditor) the amount of indebtedness, if any, owing at the time of death subject to a maximum amount under the applicable group policy of $20,000 (The Citadel Life Insurance Company),or $30,000 (Foremost Life Insurance Company), as applicable. The amount of credit accident and health insurance will pay Holder monthly benefits in installments equivalent to the monthly payments required under the contract for the term of any disability covered by the policy, subject to a maximum amount of the smaller of either the initial amount of indebtedness (total of payments shown on reverse side) or $10,000 under the group policy. All such insurance proceeds will be applied to reduce or discharge the indebtedness. If insurance is declined by the insurer or otherwise does not become effective, any premium therefor will be credited or paid to the individual(s) entitled thereto and if insurance is terminated prior to the scheduled maturity date of the indebtedness, any premium refund due will be credited or paid promptly to the individual(s) entitled thereto, the refund being computed in accordance with the refund formulas on file with the state Insurance Department. In order to induce insurer to effect any such insurance, the individual(s) desiring such coverage declares to the best of his knowledge and belief that he is now in good health and he authorizes any physician or hospital to disclose to insurer, in the event of his death or disability, all information concerning his death or disability as well as his medical history prior to the date of this transaction. All the foregoing is subject to all terms, conditions and provisions of the policies or certificates to be issued.

SECURITY AGREEMENT

The Collateral shall be at Customer's risk and Customer shall procure and maintain for the term hereof insurance against all physical damage risks at Customer's expense in such form and for such amounts as Holder may require, the proceeds thereof to be payable as interest shall appear with mortgagee's loss payable clause attached. Holder may, as creditor of Customer, purchase such insurance effective thereafter, although nothing herein contained shall impose a duty upon Holder to do so. Customer will reimburse Holder for the actual cost of such insurance to the extent that the same is not included in the deferred payment price, the amount of such reimbursement together with a Finance Charge at the highest lawful rate, to be paid in equal installments over the remaining term concurrently with the remaining unpaid instalments set forth above, and to constitute an additional obligation of Customer hereunder. Customer hereby assigns to Holder any moneys not in excess of the unpaid balance hereunder which may become payable under such and other insurance, including refunds or unearned premiums, and directs any insurance company to make payments directly to Holder to be applied to said unpaid balance and appoints Holder as attorney in fact to endorse any draft in the event at any default under this contract. Holder is authorized to cancel said insurance and credit any premium refund received against said unpaid balance.

Customer agrees to pay promptly all taxes and assessments upon the Collateral and for its use or operation and on this contract to keep the Collateral in good condition and free from liens, liabilities, claims or charges of any kind, that all equipment, tires, accessories, parts, radios, and attachments installed in or affixed to the Collateral shall, as defined by the Uniform Commercial Code, become part of the Collateral by accession, not to sell, encumber or abandon the Collateral or use it for hire, charter or illegally, not to remove or attempt to remove said Collateral from the county and state given above as Customer's address without notifying Holder in writing and not remove the Collateral from the continental United States without the Holder's express written consent; to keep and maintain the Collateral as personal property only and not to allow it to become part of any freehold; to send notice by registered mail to Holder after repossession but before resale of the Collateral if Customer claims that any articles not included herein were personal as the Collateral at the time of repossession; failure to do so barring a waiver of said bar to any subsequent claim thereof. Any notice to Customer shall be sufficiently given if mailed to the address of Customer stated herein.

Time is of the essence. Holder may collect a delinquency and collection charge on each instalment in default for 15 days or more in an amount not exceeding 5% of each said instalment of $5, whichever is less. If Customer defaults on any obligation under this contract, or if Holder shall consider the indebtedness or the Collateral insecure, the full balance may, upon election of Holder, without notice, subject to any notice of right to cure, become due and payable, less the required rebate of the Finance Charge, and rebate of any unearned insurance premiums included in this transaction, together with reasonable attorney's fees (15% if not prohibited by law) if this contract is referred for collection to an attorney, plus court costs. Customer agrees in any such case to pay said amount or, at Holder's election, to deliver the Collateral to Holder, and Holder may, without notice or demand for performance or legal process, peaceably enter any premises, but not into any dwelling, where the Collateral may be found, peaceably take possession of it and custody of anything found in it. Upon default Holder shall have all of the remedies of a secured party under the Uniform Commercial Code. The Collateral may be sold, leased or otherwise disposed of with or without notice publicly or privately, with or without having the Collateral at the sale and Holder may acquire the Collateral at any such disposition. The proceeds of disposition less all expenses of retaking, holding, repairing and selling, and to the extent permitted by applicable law, attorney's fees and legal expenses incurred by the Holder shall be credited to the unpaid balance due hereunder. Customer is liable for, and shall forthwith pay any deficiency. any surplus shall be paid to Customer. It is agreed that sale to a dealer is a commercially reasonable method of disposition, and that if prior notice to Customer of a sale or other intended disposition of the Collateral is required, 5 days notice to Customer is reasonable notice.

If Seller assigns this contract, Seller shall not be assignee's agent after transmission of payments or for any purpose.

Waiver of any default or acceptance of any past due payment shall not be a waiver of any subsequent or any other default. Holder's rights and remedies hereunder are cumulative. If any part of this contract is invalid, unenforceable or inconsistent with the applicable laws or regulations of the State of Seller's address herein, such part shall be deemed amended, modified or deleted to conform thereto.

No change in this contract shall be binding unless in writing and any agreement, representation or warranty shall be binding on the Holder unless expressly contained herein.

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

GUARANTY

In consideration of the acceptance of the instrument on the reverse side hereof, or its purchase by any assignee, we jointly and severally guarantee to any Holder the payment promptly when due of every instalment thereunder and the payment on demand of the entire unpaid balance and all other obligations of Customer thereunder, including reasonable attorney's fees, if Customer defaults in any payment of any instalment at its due date or in any other manner without first requiring Holder to proceed against Customer. We warrant that the contract is genuine, legally valid and enforceable and waive notice of acceptance hereof and of defaults thereunder and consent that Holder may, without affecting our liability, compromise or release, by operation of law or otherwise, any rights against and grant extensions of time of payment to Customer and other obligors. If we default on any obligation under this Guaranty and Holder refers the same to an attorney for collection, we shall also be liable to and pay Holder attorney's fees (15% of the amount in default, if not prohibited by law), court costs and disbursements. Witness our hands and seals.

CORPORATE GUARANTOR

_____ (SEAL)

BY _____ (SEAL)

INDIVIDUAL GUARANTOR

_____ (SEAL)

TERMS OF SELLER'S ASSIGNMENT

Wadsworth sell and assign the contract on the reverse side and all interest in the property described on the front hereof, together with any Deed to Secure Debt (or Mortgage) given as security for this contract, and our rights under any guaranty to Assignee [illegible] on the front hereof (hereinafter called "you") without recourse as to Customer's obligation of payment except as may be otherwise provided in any underlying agreement between us, with full power to you in your or our name to collect and discharge the same and to take all such legal or other proceedings as we might take save for this assignment. We warrant that the contract, Deed of Secure Debt (or Mortgage) and any guaranty are genuine, legally valid and enforceable; we have complied with all disclosure requirements imposed by the applicable Federal and State laws and Regulations; we have complied with all applicable Federal and State Laws and Regulations relating to this contract and the establishment of the contract and any Deed to Secure Debt (or Mortgage) given as security hereto; we hereby convey good title thereto; all statements of facts thereon are true; the Customer was quoted the cash price and the deferred payment price as stated therein; no part of the down payment shown on page 1 is owing by loan or note and any trade-in shown was received by us from the Customer as stated therein; all instruments made by Customer in any form constituting chattel security are true to our knowledge and Holder's [illegible] Deed to Secure Debt (or Mortgage) taken as security [illegible] Customer and [illegible] with the [illegible]

...and credits any premium refund received ... [illegible] ...

...or agrees to pay promptly all taxes and ... [illegible] ... upon the Collateral and for its use or operation and on this contract; to keep the Collateral in good condition and free from liens, labels, claims or charges of any kind, that all equipment, tires, accessories, parts, radios and attachments installed in or affixed to the Collateral shall, as defined by the Uniform Commercial Code, become part of the Collateral by accession; not to sell, encumber or abandon the Collateral or use it for hire, charter or illegally; not to remove or attempt to remove said Collateral from the county and state given above as Customer's address without notifying Holder in writing and not remove the Collateral from the continental United States without the Holder's express written consent; to keep and maintain the Collateral as personal property only and not to allow it to become part of any freehold; to insist notice by registered mail to Holder after repossession but before resale of the Collateral if Customer claims that any articles not included herein were contained in the Call Journal at the time of repossession, failure to do so being a waiver of and bar to any subsequent claim thereto. Any notice to Customer shall be sufficient, given if mailed to the address of Customer stated herein.

...requiring and using, and to the extent permitted by applicable law, attorney's fees and legal expenses incurred by the Holder shall be credited to the unpaid balance due hereunder. Customer is liable for, and shall forthwith pay any deficiency; any surplus shall be paid to Customer. It is agreed that sale to a dealer in a commercially reasonable method of disposition, and that if prior notice to Customer of a sale or other intended disposition of the Collateral is required, 5 days' notice to Customer is reasonable notice.

If Seller assigns this contract, Seller shall not be assignee's agent for transmission of payments or for any purpose.

Waiver of any default or acceptance of any past due payment shall not be a waiver of any subsequent or any other default. Holder's rights and remedies hereunder are cumulative. If any part of this contract is invalid, unenforceable or inconsistent with the applicable laws or regulations of the State of Seller's address herein, such part shall be deemed amended, modified or deleted to conform thereto.

No change in this contract shall be binding unless in writing and no agreement, representation or warranty shall be binding on the Holder unless expressly contained herein.

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

GUARANTY

In consideration of the acceptance of the instrument on the reverse side hereof, or its purchase by any assignee, we jointly and severally guarantee to any Holder the payment promptly when due of every installment thereunder and the payment on demand of the entire unpaid balance and all other obligations of Customer thereunder, including reasonable attorney's fees, if Customer defaults in any payment of any installment or its due date or in any other manner, without first requiring Holder to proceed against Customer. We warrant that the contract is genuine, legally valid and enforceable and waive notice of acceptance hereof and of default thereunder and consent that Holder may, without affecting our liability, compromise or release, by operation of law or otherwise, any rights against and grant extensions of time of payment to Customer and other obligors. If we default on any obligation under this Guaranty and Holder refers the same to an attorney for collection, we shall also be liable to and pay Holder attorney's fees (15% of the amount in default, if not prohibited by law), court costs and disbursements. Witness our hands and seals.

CORPORATE GUARANTOR

_____ (SEAL)
NAME OF GUARANTOR

BY _____
TITLE

INDIVIDUAL GUARANTOR

_____ (SEAL)
NAME

_____ (SEAL)
NAME

TERMS OF SELLER'S ASSIGNMENT

We hereby sell and assign the contract on the reverse side and all interest in the property described on the front hereof, together with any Deed to Secure Debt (or Mortgage) given as security for this contract, and our rights under any guaranty to Assignee shown on the front hereof (hereinafter called "you") without recourse on us to Customer's obligation of payment, except as may be otherwise provided in any underlying agreement between us, with full power to you in your or our name to collect and discharge the same and to take all such legal or other proceedings as we might take, save for this assignment. We warrant that the contract, Deed of Secure Debt (or Mortgage) and any guaranty are genuine, legally valid and enforceable; we have complied with all disclosure requirements imposed by the applicable Federal and State Laws and Regulations; we have complied with all applicable Federal and State Laws and Regulations relating to the contract and the establishment of the contract and any Deed to Secure Debt (or Mortgage) given as security herein; we have not required Customer to purchase credit insurance; no part of the down payment shown as paid in such a contract and any Deed to Secure Debt (or Mortgage) given as security herein; we have not required Customer to purchase credit insurance; no part of the down payment shown as paid in such a therein are true; the Customer was quoted the cash price and the deferred payment price as stated therein; no part of the down payment shown as paid in such a owing by loan or note and any trade-in shown was received by us for the allowance agreed therein; all statements made by Customer on any forms related thereto are true to our knowledge and belief; we have clear title to the property, free of all liens and encumbrances, except for this contract, any Deed to Secure Debt (or Mortgage) taken as security for this contract has been duly recorded and is a first lien or encumbrance on the property described, except as expressly noted thereon; Customer is not a minor and has capacity to contract; Certificate of Title showing the first lien or encumbrance in your favor has been or will be forthwith obtained; with the lien thereon perfected as of the date of the contract, if permitted by law. We further warrant and agree to abide by all agreements, warranties or guarantees, either express, implied or required by law, afforded Customer relative to the property described on the front hereof. All warranties herein contained are made to induce you to purchase this contract and if there is a breach of any, or if Customer withholds payment as required under the contract, because Customer alleges a claim, defense or set off against us, without regard to your or our knowledge or lack of knowledge with respect thereto or your reliance thereon, we will on demand purchase this contract from you for the balance then remaining unpaid, plus any and all costs and expenses paid or incurred in respect thereto, as aforesaid. If Customer recovers any amounts from you as a result of such claim, you will reimburse you for such amounts paid to Customer. We waive all demands and notice of default and consent that, without notice to us, you may extend time to or compound or release, by operation of law or otherwise, any rights against Customer or any other obligor. If we execute any guaranty covering this transaction, the words "without recourse on its Customer's obligation of payment" are deemed delivered, and, notwithstanding the provisions of any underlying agreement whatsoever between us, your recourse on us on the assignment shall be as stated in such guaranty. If we did not execute any such guaranty and have no underlying agreement with you governing our assignment to you in your standard full recourse form. Notwithstanding anything in this assignment, this contract shall be deemed sold to you, as to re-purchase, with our assignment to you in your standard full recourse form.

(See other side for Seller's signature to assignment)

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Supreme Court, U.S.
FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC.,
Petitioner,

VS.

ARTHUR QUILLER, LILLIE MAE QUILLER
and all Other Persons Similarly Situated,
Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Supreme Court exercise its discretionary power to review the *en banc* opinion of the Eleventh Circuit Court of Appeals reversing the District Court's judgment dismissing this case for failure to state a claim when none of the eleven Judges sitting *en banc* was in favor of affirming the District Court's opinion and when the record in this case shows not only that the contract used by BarclaysAmerican affirmatively misrepresented to the Quillers their statutory guarantees, but also the actions taken by BarclaysAmerican were contrary to and inconsistent with the Quillers having a right to cure a default within 30 days after receiving a notice of default as required by the Depository Institutions Deregulation and Monetary Control Act of 1980, § 501(c), 12 USCA § 1735(f)-7(Note), and the consumer protection regulations promulgated thereunder, 12 C.F.R. § 590.4(h)?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC.,

Petitioner

VS.

ARTHUR QUILLER, LILLIE MAE QUILLER and all Other Persons Similarly Situated,

Respondants.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Statement of the Case submitted by petitioner (BarclaysAmerican) contains many material omissions and misstatements of fact. The Depository Institutions Deregulation and Monetary Control Act of 1980 (hereinafter referred to as "DIDMCA"), does not govern "disclosure," but is a statute requiring certain contractual guarantees if state law is to be preempted. This is not a truth-in-lending case. The issue is not disclosure; it is the possession by consumers of those benefits mandated by Congress.

In enacting DIDMCA, Congress had aims other than merely allowing mobile home finance companies to charge unlimited time-price differentials or finance charges. In *Quiller v. BarclaysAmerican/Credit, Inc.*, 727 F.2d 1067,

1071 (11th Cir. 1984), the Court indicated that there was a *quid pro quo* for preemption:

> In determining whether the terms and conditions of this agreement comply with the Board's consumer protection regulations, we should keep in mind that Congress included manufactured home financing in its preemption scheme *only on the condition that consumer-debtors would be guaranteed certain safeguards. See* H.Conf.Rep. No. 96-842, 96th Cong.,2d Sess. 79, *reprinted in* 1980 U.S. Code Cong. & Ad.News 298, 309. (Emphasis added.)

The need for the minimum consumer benefits and safeguards set forth in DIDMCA, § 501(c), and the consumer protection regulations, 12 C.F.R. § 590.4 is that, as a class, mobile home buyers are more vulnerable, easier to overawe, less able to understand or defend their rights, easier to intimidate and easier to victimize. (See Petition for Writ of Certiorari in *Grant v. General Electric Credit Corp.*, Case No. 85-584, pp.5-9.) In enacting DIDMCA, Congress intended that certain consumer protection benefits be part of the "terms and conditions" of credit sale contracts by requiring that the "terms and conditions" relating to credit sales comply with the consumer protection provisions specified in regulations promulgated by the Federal Home Loan Bank Board (hereinafter "FHLBB"). Congress mandated a right to cure by providing that the regulations "*shall require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in case of abandonment or other extreme circumstances).*" DIDMCA, § 501(c)(2). In proposing regulations, the FHLBB twice warned mobile home finance companies that their contracts would be open to attack under state usury laws and would not be eligible for preemption unless the credit sale contract or "loan" "complied with such regulation" and unless the consumer

protections were "included in loans." 45 Fed.Reg. 31
(May 12, 1980) (proposed May 5, 1980), 45 Fed.Reg. 43
(June 30, 1980). In the preamble to the final amendment
the regulations, the FHLBB stated that those regulat
only applied when a creditor covered by the Act *choose*
charge an interest rate which exceeds the state usury l
on mobile home loans. 45 Fed.Reg. 43681, 43682 (June
1980).

On June 27, 1981, the Quillers entered into a retail ins
ment sales contract with Vintage Enterprises, Inc., c
form contract prepared by petitioner, Barclays Amer
(BarclaysAmerican, Appendix M-8-M-11). The cont
was made in the State of Georgia, was to be performed in
State of Georgia, and was subsequently assigned
BarclaysAmerican.[1]

The unpaid balance owed by the Quillers at the time of
contract was $16,000.00. The time-price was $47,417
making the total time-price differential or finance cha
$31,417.40 (BarclaysAmerican, Appendix M-8). In Geor
the maximum time-price differential was limited to a
add-on rate, which, in this case amounts to $24,000.00 (
× 15 years × $16,000 = $24,000). O.C.G.A. § 10-1-3
BarclaysAmerican charged the Quillers $7,417.40 in ex
of that permitted by Georgia law.

By placing the Quiller contract in one hand and DIDM
and the consumer protection regulations in the other,

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[1]In Georgia, the conflicts rule is that the law of the place o
contract governs. O.C.G.A. § 1-3-10; *General Telephone Co. o*
Southeast v. Trimm, 252 Ga. 95, 311 S.E.2d 460 (1984). The con
further provided that if any part of the contract was invalid, une
ceable or inconsistent with the applicable laws or regulations o
state of the seller's address, that such part of the contract wou
deemed amended, modified or deleted to conform thereto.
clays American, Appendix M-10).

can easily determine that the contract not only does not grant as "terms and conditions" those rights that must be granted in order to obtain preemption, but also that the contract contains affirmative misrepresentations as to the consumer's statutory and regulatory guarantees.

The Quiller contract provides in part:

> *Time is of the essence* . . . If Customer defaults on any obligation under this contract, or if *Holder shall consider the indebtedness or Collateral insecure, the full balance may, upon election of Holder, without notice, subject to any notice of right to cure, become due and payable*, less the required rebate of the Finance Charge . . . Customer agrees in any such case to pay said amount or, at Holder's election, to deliver the Collateral to Holder and Holder may, *without notice or demand for performance or legal process*, peaceably enter any premises, but not into any dwelling, where the Collateral may be found, peaceably take possession of it and custody of anything found in it. Upon default, Holder shall have all the remedies of a secured party under the Uniform Commercial Code. (BarclaysAmerican, Appendix I-3; M-10; B-8). (Emphasis added.)

Now, compared with the statute, it is obvious that the "terms and conditions" relating to this credit sale do not "require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances)." DIDMCA, § 501(c)(2). It is also clear that this credit sale contract contained "terms and conditions" inconsistent with the requirement that no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance can be taken against the debtor until 30 days after the creditor

sends the debtor a notice of default in the form set forth in the regulation. 12 C.F.R. § 590.4(h). It is also clear that the right to demand the "full balance" is contrary to the regulation that allows only past due payments and late charges to be demanded on the first two defaults in a year.

In September of 1982, the Quillers missed a payment. In its amended answer and counterclaim, BarclaysAmerican admitted *in judicio* that the Quillers were then sent a *20-day notice* to cure default, not the required 30-day notice set forth in 12 C.F.R. § 590.4(h) (see BarclaysAmerican's first amendment to its Answer, Appendix A-2a, 4a). That notice of default further stated that:

(a) The Quillers would only be given one notice of right to cure this default, all contrary to 12 C.F.R. § 590.4(h).

(b) That if there was another default, no additional notice would be sent, all contrary to 12 C.F.R. § 590.4(h).

(c) That the Quillers would be liable for the difference between the value of their home and $44,309.39, that sum being the unpaid total of payments, contrary to 12 C.F.R. § 590.4(c).

Mrs. Quiller promptly cured that default (R-3, pp.34-35).

In December of 1982, the Quillers again missed a payment. In connection with that default, according to uncontradicted testimony and according to the *in judicio* admissions of BarclaysAmerican, no attempt whatsoever was made to give the Quillers any notice of default or any right to cure this default as required by DIDMCA, § 501(c)(2), or 12 C.F.R. § 590.4(h) (BarclaysAmerican Appendix A; R-3, pp.39-40). In connection with that occurrence, BarclaysAmerican merely had the Quillers execute a document

authorizing BarclaysAmerican to take possession of their home (Appendix A-6a-7a). This attempt to obtain the Quillers' trailer precipitated the filing of this action. The Quillers are still in their home.

BarclaysAmerican has inadvertently omitted to mention to this Court that in connection with its defense of this action, it took the position that DIDMCA was unconstitutional and that this contract was governed by the laws of the State of South Carolina (Appendix B).[2]

BarclaysAmerican inadvertently failed to inform this Court that at the time this action was filed, the Superior Court of Richmond County, Georgia granted a temporary restraining order protecting members of this class from repossessions and foreclosures without judicial supervision (Appendix C). The District Court, after an evidentiary hearing and prior to dismissing this case, also granted preliminary injunctive relief providing protection for the members of this class (Appendix D). BarclaysAmerican fails to mention to this Court that as long as the mandate of the Eleventh Circuit is stayed, that it is free to continue to foreclose security interests, repossess homes without notice and collect finance charges in excess of that permitted by Georgia law, all without judicial supervision.

BarclaysAmerican has inadvertently failed to mention the genesis of the "Vartanian" informal opinion (BarclaysAmerican, Petition, pp.5-6; BarclaysAmerican, Appendix J). That unofficial opinion was a letter issued 16 months after the date of the Quiller contract, was not an "interpretation" or rule made pursuant to the Admin-

[2]Even if South Carolina law governed this transaction, BarclaysAmerican charged more than permitted by South Carolina law. The South Carolina law then in effect limited the time-price differential to a finance charge based on 18% simple. § 37-2-201(2)(b) of the South Carolina Code of 1976.

istrative Procedures Act, 5 U.S.C. § 553 or under DIDMCA § 501(f) and was merely an informal opinion solicited by a mobile home finance company in an effort to defeat litigation pending in the State of Arkansas, all without notice to the parties in connection with the Arkansas litigation and without notice to the public. This unofficial opinion was solicited by the law firm of Witkowski, Weiner, McCaffrey and Brodsky of Washington, D.C., the same law firm which filed an *Amicus* brief before the Eleventh Circuit on behalf of the Coordinating Counsel on Manufactured Housing Finance (Appendix E)[3]

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[3]This letter requesting the Vartanian letter was, as well as other internal memoranda of the Office of General Counsel of the FHLBB and other requests from mobile home finance companies obtained pursuant to the Freedom of Information Act subsequent to the initial opinion in *Quiller v. BarclaysAmerican/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1984). These documents reveal that throughout this and related litigation, certain mobile home finance companies have met, solicited and suggested that certain positions be advanced by the then acting General Counsel of the FHLBB, all *ex parte* without notice to the Quillers or similar plaintiffs in companion litigation. This unilateral method of producing "unofficial opinions" has resulted in the Office of General Counsel receiving only those facts and contentions favorable to the mobile home finance companies. The Quillers were concerned that the Office of General Counsel of the FHLBB might unsuspectingly be utilized in such a manner by certain mobile home finance companies and, thus, requested to be notified if this procedure was used as early as May 11, 1983 (Appendix F). The Office of General Counsel never responded to that request and the Quillers were never notified concerning the meeting of May of 1983 (Appendix G, Note 1; Appendix H, ¶ 1), the request for assistance in August of 1983 (Appendices G and H) and the meetings and request for assistance in March and April of 1984 (Appendices J, K, L and M). The Office of General Counsel of the FHLBB, in connection with this litigation and in connection with companion litigation, has not been an impartial agency issuing interpretations of its regulations, but has been an advocate of certain mobile home finance companies, issuing

The "Vartanian" letter was not an interpretation of the FHLBB and there had been no delegation of authority to the Office of General Counsel to issue interpretations with regard to § 501(f) of DIDMCA (Appendix I). Furthermore, the "Vartanian" letter did not refer to the mandate of Congress contained in § 501(c)(2) of DIDMCA and made no reference to the expressions of regulatory intent by the FHLBB set forth in the *Federal Register* in connection with proposed regulations and in connection with final regulations promulgated. 45 Fed.Reg. 31122 (May 12, 1980); 45 Fed.Reg. 43681 (June 30, 1980); 45 Fed.Reg. 43682 (June 30, 1980).

BarclaysAmerican has inadvertently failed to mention that the *Amicus* briefs filed by the Office of General Counsel of the FHLBB were all the product of lobbying efforts by BarclaysAmerican and other mobile home finance companies, conducted all *ex parte* and without notice to the Quillers (Appendices G, H, J, K, L and M). The method of litigating this controversy chosen by certain finance companies magnifies the importance of our adversarial system of justice.

As can be seen from some of the *ex parte* communications with the Office of General Counsel of the FHLBB, mobile home finance companies have even suggested what arguments should be made by the Office of General Counsel (Appendix M). The documentation that has been produced pursuant to the Freedom of Information Act shows that the Office of General Counsel of the FHLBB quickly responded to mobile home finance companies' requests and during this same period of time, the request made by the Quillers on

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post hoc rationalizations. (The documents reproduced in Appendices E, F, G, H, I, J, K, L and M were included in the Appendices to the *en banc* briefs filed by the Quillers before the Eleventh Circuit.)

May 11, 1983, merely to be advised and to be heard, remained unanswered (Appendix F).

BarclaysAmerican has inadvertently overlooked the fact that according to the Office of General Counsel's second *Amicus* brief, BarclaysAmerican is not entitled to claim that the Quiller transaction is preempted from state law. In connection with that *Amicus* brief, even the Office of General Counsel stated that if, in fact, a court found that the prescribed notice under 12 C.F.R. § 590.4(h) was not provided to the debtor, then the creditor would lose its federal preemption of state usury laws and the debtor would then have available to it the full panoply of rights and remedies under the applicable state usury statutes (BarclaysAmerican Appendix L-16).

REASONS FOR NOT GRANTING THIS WRIT

I. Introduction:

A. BarclaysAmerican Cannot Prevail Under its Own Theory.

The record shows that the conduct of BarclaysAmerican places its contract outside the scope of DIDMCA (Appendix A). Therefore, even if this Court agrees with BarclaysAmerican, it cannot prevail.

BarclaysAmerican has argued that DIDMCA and the consumer protection regulations promulgated thereunder, 12 C.F.R. § 590.4 were only intended to govern "conduct" subsequent to the time of the contract. Such arguments presuppose that Congress intended with the enactment of DIDMCA to preempt all state regulations of time-price differential in connection with the credit sales of trailers or mobile homes. Such a construction requires one to ignore the plain meaning of DIDMCA, § 501(c), which provides that the preemption afforded by that statute does not apply

to a "credit sale" unless the "terms and conditions" relating to such "credit sale" comply with the consumer protection provisions specified in regulations promulgated by the FHLBB. That construction also requires one to ignore DIDMCA, § 501(c)(2), where Congress mandated that those regulations "require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in case of abandonment or other extreme circumstances)."

It is also clear from the FHLBB comments to proposed regulations that if the credit sale contract did not comply with the regulations, that such a contract would be open to attack under state usury laws and would not be eligible for preemption. 45 Fed.Reg. 31122 (May 12, 1980) (proposed May 5, 1980), 45 Fed.Reg. 43681 (June 30, 1980). BarclaysAmerican also overlooked the preamble to the final regulations which provides that a mobile home lender still had to make a choice of either proceeding under state law or entering into a credit sale under federal law, the FHLBB providing in part:

> Applicability: These regulations apply only when a creditor covered by the Act *chooses* to charge an interest rate which exceeds the state's usury limit on mobile home loans. 45 Fed.Reg. 43681, 43682 (June 30, 1980). (Emphasis added.)

A mobile home finance company has to make a "choice" at the inception of the contract. To adopt BarclaysAmerican's position would be to ignore the law which provides that preemption of state law by a federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that Congress had unmistakenly so ordained. *Florida Lime and Avacado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

BarclaysAmerican also failed to point out that even if this Court adopted the post-hoc rationalizations of the General Counsel of the FHLBB set forth in an Amicus Brief filed before the Eleventh Circuit, BarclaysAmerican, based on its own *in judicio* admissions and based on its own conduct subsequent to the date of the contract, lost its preemption. (Appendix A; see, also, BarclaysAmerican's Appendix L-10, where the FHLBB's General Counsel stated in an Amicus Brief:

> . . . if the creditor fails to give the Board prescribed notice upon certain debtor defaults, the usury preemption is lost.)[4]

The undisputed facts in the record, including the admissions *in judicio*, show that in fact BarclaysAmerican's subsequent conduct violated both DIDMCA and the regulations by (a) giving the Quillers a 20-day notice to cure (Appendix A-2a, 4a); (b) providing in the 20-day notice language that the Quillers would not be given any further notice upon further default and that the Quillers would be liable for the difference between the value of the home and the amount falsely claimed to be the unpaid balance (Appendix A-4a); (c) upon the second default within the same year, making immediate demand for the trailer and obtaining a release permitting immediate repossession (Appendix A-6a-7a); (d) in connection with its counterclaim, accelerating and seeking possession of the trailer and judgment for the debt plus attorney's fees without giving the prerequisite notice of right to cure (Appendix A-3a). Furthermore, the "conduct"

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[4]In its initial *Amicus* brief, the Office of General Counsel stated in part, "state usury limits on loans on residential manufactured homes are preempted as long as the loans *are made* in conformance with the Board's consumer protection regulations . . . " (BarclaysAmerican, Appendix K-8). Only after the panel decision favorable to the plaintiffs did General Counsel switch to the "conduct" theory.

argument has not been accepted, either by the majority or by the dissent *en banc* in *Quiller v. BarclaysAmerican/Credit, Inc.*, 764 F.2d 1400 (11th Cir. 1985).

BarclaysAmerican has argued that the dissents in *Quiller v. BarclaysAmerican/Credit, Inc.*, 764 F.2d 1400 (11th Cir. 1985), revealed a sharp and fundamental philosophical split among the Court members. BarclaysAmerican has obviously misread these dissents. Circuit Judge Roney, in dissenting, was of the opinion that the contract was at best ambiguous and that it should not be held invalid on a motion to dismiss. While the dissent addressed the issue of what remedy was available, the District Court has not addressed the issue of "remedy" and until that issue is addressed by the District Court, it is premature.

The Quillers believe that in order for a transaction to be preempted from state law under DIDMCA, that the terms and conditions of the contract must specifically grant to a mobile home purchaser the right to cure a default within 30 days after the sending of a notice of default prior to any action to accelerate, repossess or foreclose. However, this is not the case to decide that issue. Under BarclaysAmerican's own "conduct" theory, this contract is not entitled to preemption.

B. Economic Impact.

The statement made by BarclaysAmerican that the potential *ad damnum* in this case and in similar cases is in the hundreds of millions of dollars, is an allegation that is not supported by the record in this case or in other related cases. While BarclaysAmerican and other mobile home finance companies have made that argument on the one hand, at the same time, they have argued that the potential recovery is substantially limited. While the Quillers believe that they and those similarly situated are entitled to the

damages set forth in the Georgia Motor Vehicle Sales Finance Act (GMVSFA), O.C.G.A. § 10-1-38(b) and O.C.G.A. § 10-1-38(c), the issue of *ad damnum* has not yet been decided by the District Court and is not properly before this Court.

Furthermore, while a motion for class certification was pending at the time this case was dismissed (R-318-319), this case has not yet been certified. Thus, as this case stands, the individual plaintiffs are seeking a bar to the collection of finance charges and if this violation of Georgia law was willful, double the time-price differential. O.C.G.A. § 10-1-38; *Bozeman v. Tifton Federal Savings & Loan Assn.*, 164 Ga.App. 260, 297 S.E.2d 49 (1982). Also, under the contract of adhesion drafted by BarclaysAmerican, at a minimum, the Quillers would be entitled to a contract which limited the finance charges to the maximum permitted by Georgia law, which is some $7,417.40 less than what is being assessed. The Quiller contract, drafted by BarclaysAmerican, provides that if it is inconsistent with state law, the contract would be deemed amended, modified or deleted to conform thereto (BarclaysAmerican, Appendix I-3; M-10).

On the Quillers' side, the argument can be made that every day consumers are being damaged. Every day BarclaysAmerican is collecting monies not permitted by Georgia law and consumers are without the protection mandated by Congress. The delay that BarclaysAmerican now seeks can only benefit one party, that is, BarclaysAmerican. Every day, as long as the mandate of the Eleventh Circuit is stayed, BarclaysAmerican is free to repossess, foreclose and accelerate, all without judicial supervision. As pointed out by the Eleventh Circuit, not every controversy culminates in litigation. Unsophisticated consumers are unnecessarily seeking the protection of bankruptcy or even

worse, voluntarily relinquishing their homes to Barclays-American under threats such as that the axles and wheels are on their way (see extract from the Order of the United States District Court for the Southern District of Georgia on June 9, 1984 granting preliminary relief to the class in *Moyer, et al v. Citicorp, et al*, Case No. CV 183-93, set forth in the Petition for Writ of Certiorari in the case of *Grant v. General Electric Credit Corp.*, Case No. 85-584, p.7-9).

II. The Eleventh Circuit's Decision Is Not Contrary To Any "Interpretation" Of The Federal Home Loan Bank Board.

A. The Eleventh Circuit's Opinion.

Contrary to the assertions made by BarclaysAmerican, the Quillers did not merely allege that the Quiller contract was not entitled to preemptive status because the contract violated 12 C.F.R. § 590.4(h). The Quillers alleged that BarclaysAmerican's contract was governed by the provisions of the GMVSFA and that BarclaysAmerican willfully violated the provisions of the GMVSFA (¶¶ 5 and 7, plaintiffs' complaint; BarclaysAmerican's Appendix M-2, M-3). In connection with BarclaysAmerican's motion to dismiss, the allegations of the complaint must be taken as true and this complaint should not have been dismissed for failure to state a claim unless it appeared beyond doubt that the plaintiffs could prove no set of facts in support of their claim which would entitle them to relief. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1962); *Conley v. Gibson*, 355 U.S. 41 (1957). When this case was dismissed, the District Court had before it BarclaysAmerican's *in judicio* admissions that its conduct was contrary to DIDMCA, § 501(c)(2), and 12 C.F.R. § 590.4(h) (Appendices A, B; R-3, pp.34-51). Furthermore, while there were majority and dissenting opinions of the Eleventh Circuit sitting *en banc*, no opinion was in favor of affirming the District Court's order.

B. The FHLBB has not Issued any Official Interpretation Inconsistent with the Majority Opinion in Quiller.

The Vartanian letter was merely an unofficial opinion by the then General Counsel, solicited at the request of a mobile home finance company in an effort to defeat litigation pending in the State of Arkansas, all without notice to the other parties (Appendix E). There had been no delegation of authority from the FHLBB to the General Counsel to issue any interpretation pursuant to § 501(f) of DIDMCA (Appendix I). Furthermore, the Vartanian letter merely referred to the regulations and not to the statute, which statute showed the intent on the part of Congress that a 30-day notice of default and right to cure prior to any action leading to repossession or foreclosure was a prerequisite to preemption. DIDMCA § 501(c)(2).[5]

BarclaysAmerican has argued that Amici Brief of the FHLBB's General Counsel should be entitled to deference. Deference should not be afforded to *post hoc* rationalizations by the then acting General Counsel or General Counsel of the FHLBB obtained *ex parte* in connection with pending litigation. *Bread Political Action Committee v. FEC*, 455 U.S. 577 (1982) at 582; *Consumer Products Safety Commission v. GTE Sylvania*, 447 U.S. 102 (1980). These unofficial opinions of General Counsel are not the same as official

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[5]Congress was obviously aware that in connection with a substantial number of conventional residential real estate mortgage loans, the documentation used which consisted of a promissory note and mortgage which are on uniform instruments approved by the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Federal National Mortgage Association. These uniform instruments, which are accepted nationally in the secondary mortgage business, contain contractual rights granting the debtor the right to a 30-day notice of default and the right to cure that default within 30 days prior to acceleration or foreclosure (see Appendix N).

interpretations. "Unraveling a New Federal Usury Law," *The Business Lawyer*, Vol. 37, April 8, 1982, p.1079. In the case at hand, the *post hoc* rationalizations are inconsistent with the statute, are inconsistent with the position of the FHLBB at the time comments were sought on the proposed regulations and are inconsistent with the preamble to the final regulations. DIDMCA, § 501(c); 45 Fed.Reg. 31122 (May 12, 1980); 45 Fed.Reg. 43681 (June 30, 1980).

C. This Court's Opinion in Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980), Does Not Require Reversal.

In *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), this Court dealt with a truth-in-lending situation where Congress, in the Truth-in-Lending Act, had delegated broad administrative lawmaking powers to the Federal Reserve Board when it framed the Act. 15 U.S.C. § 1640. There, Congress conferred special status upon official staff interpretations. 15 U.S.C. § 1640(f). In *Milhollin*, there was a complete absence of an expressed statutory mandate that acceleration clauses be disclosed. In the case at hand, the Act requires, itself, that the "terms and conditions" of the "loan" or "credit sale" comply with the consumer protection provisions. Congress obviously intended that mobile home owners, just as conventional homeowners whose mortgages are evidenced by uniform Freddie Mac and Fannie Mae forms, would be given a specific right to a notice of default and a specific right to cure such a default within a 30-day period prior to repossession or foreclosure. DIDMCA § 501(c)(2)(Appendix N). If this Court were to adopt the position advanced by BarclaysAmerican, then this Court would abdicate its judicial responsibility to interpret the plain meaning of this statute and these regulations to the then acting General Counsel of the FHLBB. *Securities Industries Assn. v. Board of Governors of the*

Federal Reserve System, 468 U.S. ____, 82 L.Ed.2d 107 (1984). Surely, this Court did not intend for *Milhollin* to be used to sanction parties in litigation attempting to defeat pending litigation by obtaining *post hoc* rationalizations from a government employee, all *ex parte*. (Obviously, if finance companies had been unsuccessful in their *ex parte* efforts, these unofficial opinions would never have been known to the Quillers or to similar mobile home purchasers.)

Furthermore, *Milhollin* does not stand for the proposition that an agency's construction of a *contract* is entitled to great weight. In this case, the Office of General Counsel of the FHLBB is attempting to construe the Quiller contract. Courts construe contracts.

The body of American law, by general rule, is that the right to repossess is absolute once default has occurred and the secured party may immediately repossess without notice—unless *otherwise provided in the contract*. If there is no provision in the contract requiring the creditor to give notice prior to repossession, there is no such right to notice prior to repossession. Uniform Commercial Code, § 9-503. Georgia follows that same general rule in the construction of its adoption of the Uniform Commercial Code. O.C.G.A. § 11-9-503; *Ford Motor Credit Co. v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978). In that case, the Georgia Supreme Court held that the consumer had no cause of action for wrongful repossession without notice because the consumer had no contractual right to notice. The Quiller contract contains language almost identical to that in *Hunt*. Barclays-American has argued that the invalid portions of its contract of adhesion should simply be invalidated and that consumers can adequately be protected from actual violations of DIDMCA when and if they occur by a counterclaim for wrongful repossession (BarclaysAmerican, Petition for Certiorari, p.25).

BarclaysAmerican correctly noted that Georgia courts have allowed recovery in tort for wrongful repossession. However, one of the cases cited is particularly inappropriate, that being *Ford Motor Credit Co. v. Hunt*, 141 Ga.App. 612, 234 S.E.2d 112 (1977). Inadvertently, BarclaysAmerican overlooked the fact that *Ford Motor Credit Co. v. Hunt*, 141 Ga.App. 612, 234 S.E.2d 112 (1977), was specifically reversed by the Georgia Supreme Court in *Ford Motor Credit Co. v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978). (See the intermediate decision of the Georgia Court of Appeals, after the initial remand, at 144 Ga. App. 281, 241 S.E.2d 9 (1977).) In reversing the Georgia Court of Appeals, the Georgia Supreme Court specifically held that the plaintiff had no cause of action for wrongful repossession. In that case, the repossession was done without any prior notice of the repossession or of the intent to accelerate the entire balance of the debt. The Georgia Supreme Court held that the creditor had the right to accelerate without notice and to repossess without notice because there was no requirement *in the contract* that notice be given prior to repossession or acceleration.

BarclaysAmerican more appropriately should have cited its own case of *Roach v. BarclaysAmerican/Credit, Inc.*, 164 Ga.App. 616, 298 S.E.2d 304 (1982). In that case, BarclaysAmerican not only repossessed the automobile, but also abducted the owner. The Georgia Court of Appeals agreed with BarclaysAmerican that it had, on default, the right to take possession of its collateral without judicial process if that could be done without breach of the peace, but held that summary judgment in favor of BarclaysAmerican was inappropriate since BarclaysAmerican not only repossessed the property but the owner as well. In light of BarclaysAmerican's conduct toward Mrs. Roach and the Quillers, it is obvious that the consumer benefits man-

dated by Congress must be set forth in the contract if they are to be meaningful.

III. The *En Banc* Opinion In *Quiller* Is Not In Conflict With The Clear Language Of DIDMCA and 12 C.F.R. § 590.4(h).

A. DIDMCA is Not a Disclosure Statute.

In enacting DIDMCA, Congress referred to the "terms and conditions" of the credit sale. DIDMCA § 501(c)(2). This is not a disclosure statute but is a statute governing the substantive contractual rights of the parties. In the preamble to the final regulations promulgated by the FHLBB, it was specifically pointed out that a mobile home financier could continue to finance trailers under state law, in which case the time-price differential would be limited, but no consumer benefits mandated by Congress would have to be granted, or could instead choose the right to charge unlimited finance charges and fall within the ambit of the federal scheme. If this statute were merely a "conduct" statute as argued by BarclaysAmerican, then BarclaysAmerican would not have to make the election as to whether or not it fell within the federal scheme or the state scheme until its conduct was challenged. That position is contrary to the provisions of the preamble to the final regulations which requires that a "choice" be made. 45 Fed.Reg. 43682 (June 30, 1980).

B. The Contract Provisions of BarclaysAmerican's Contract are in Contradiction to DIDMCA and the Consumer Protection Regulations Promulgated Thereunder.

Circuit Judge Roney, in writing the main dissent, did not adopt the position that a contract can be a federal preemption contract and at the same time claim an unqualified right to accelerate, repossess or foreclose "without notice." Judge Roney wrote:

> It would be inconsistent with federal law for a preemption contract to claim an unqualified right to acceleration, repossession or foreclosure without notice. (764 F.2d at 1401.)

In this case, this Court has before it not merely the naked contract but also the creditor's own actions in enforcing and interpreting its contract. How did BarclaysAmerican construe its own language of adhesion? Not only did the Quiller contract contain inaccurate statements of the creditor's rights under federal law and authorized the creditor to do acts prohibited by DIDMCA, but the actual *conduct* of BarclaysAmerican was contrary to the federal law upon which it now relies (Appendices A, B, D; R-3, pp.34-51).

On page 23 of its Petition for Writ of Certiorari, BarclaysAmerican makes the statement that in the instant case there had been alleged in the complaint no effort on the part of BarclaysAmerican to enforce the provisions of the contract which allegedly violated § 590.4(h). That statement implies facts at odds with BarclaysAmerican's own *in judicio* admissions (Appendix A).

C. This Court Should not Adopt the Second Division of Judge Roney's Dissent in *Quiller 2*.

BarclaysAmerican seeks to use this petition for writ of certiorari to obtain an advisory opinion from this Court as to what damages are available to the Quillers, contrary to provisions of Article 3, Section 1 of the United States Constitution. At this stage, the District Court has not yet assessed damages against BarclaysAmerican and that issue has not yet been presented to the District Court.

IV. The *Quiller* Decision Does Not Affect All Mobile Home Sales And There Is No Evidence To Support Claims Of Billions Of Dollars Worth Of Damages.

A. The Quiller Opinion Does Not Change the Rules of Contractual Construction.

According to the dissent, the language chosen by BarclaysAmerican is ambiguous. Ambiguous contracts are

construed against the drafters. This was a contract of adhesion in which BarclaysAmerican sought not to pay the price for federal preemption, *i.e.*, the granting of certain consumer protections.

The argument is made that immediacy is the essence of acceleration. There is no right to acceleration unless so provided for in the contract. Exactly when a contract is in default is also a matter that has to be set forth in the contract. *Borochoff Properties, Inc. v. Howard Lumber Co.*, 115 Ga.App. 691, 155 S.E.2d 651 (1967); *Trust Company Bank v. Johnson*, 143 Ga.App. 650., 239 S.E.2d 542 (1977). Acceleration clauses can easily be written, such as those in FNMA/FHLMC uniform instruments, all of which contain a 30-day grace period (Appendix N). The arguments that the collateral is a mobile home or trailer ignores the realities of trailer living.[6]

As correctly pointed out by the Eleventh Circuit, most disputes involving mobile home purchasers and finance companies do not culminate in litigation. BarclaysAmerican would have this Court believe that its conduct is always exemplary and that its conduct is consistent with the mandates of Congress and the FHLBB, factors which, according to BarclaysAmerican's own *in judicio* admissions are not correct (Appendix A).

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[6]Trailers are sold *sans* axles, wheels and tongues used to transport them. Doublewide trailers come in two halves which are attached together at the homesite. These cannot be made readily mobile. Most trailers have skirts and trailers are generally connected to an electrical source, a septic tank and a well. The reason that mobile home finance companies do not wish to specify the 30-day right that is the price for preemption is that threats of foreclosure and threats that the axles and wheels are on their way, place the finance companies in a better position to pressure mobile home purchasers on a day-to-day basis.

B. The Potential Detrimental Consequences to Either Lenders or Consumers are Not Relevant to the Issues Presented Here.

Not all mobile home lenders will be affected by the Eleventh Circuit's opinion. A substantial number of lenders have paid the price for preemption by granting consumers the specific rights set forth in DIDMCA, § 501(c)(2), and the consumer protection regulations promulgated thereunder, 12 C.F.R. § 590.4.

In this case, BarclaysAmerican has not paid the price for preemption and has sought to reserve all rights and remedies that it would have under Georgia law. The *quid pro quo* for preemption has not been paid, yet BarclaysAmerican seeks to collect from the Quillers $7,417.40 more than Georgia law allows.

It is presumed that most mobile home finance companies obey the law and draft their contracts to grant the consumer benefits specifically mandated by Congress and the FHLBB in order to obtain preemption. Furthermore, certain states had no restrictions whatsoever on what could or could not be charged in connection with credit sales of mobile homes and certain states have different provisions than Georgia in dealing with what damages are available if their state regulatory scheme is violated.

The argument is made that creditors simply have not planned for and are not prepared for the consequences of the *Quiller* decision. There is no evidence in this record to support such statements. If, in fact, BarclaysAmerican has willfully and intentionally violated the GMVSFA, then it is not up to this Court to grant BarclaysAmerican a pardon. Similar arguments as to the damages that do flow to consumers who have their trailers pulled in the middle of the night, who lose their possessions and household contents,

who are forced into bankruptcy proceedings, etc., could be made. After all, those alleged billion of dollars of finance charges came out of the pockets of the mobile home buying public. However, the issue of damages is not before this Court and the appropriateness of the remedy available to the Quillers is a subject that is addressed by state law if, in fact, state law has not been preempted.

CONCLUSION

This Court should not grant BarclaysAmerican's Petition for Writ of Certiorari. According to BarclaysAmerican's own *in judicio* admissions, the Quiller contract is not entitled to preemption. The Eleventh Circuit is correct in holding that the contract authorizes conduct inconsistent with DIDMCA and the consumer protection regulations, contrary to BarclaysAmerican's hypertechnical argument.

Respectfully submitted,

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JOHN B. LONG

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

ARTHUR QUILLER, LILLIE MAE QUILLER, and all other persons similarly situated,

Plaintiff,

v.

BARCLAYSAMERICAN/CREDIT, INC.,

Defendant.

Civil Action File No. 183-87

DEFENDANT'S AMENDMENT TO ANSWER

COMES NOW the defendant in the above-styled action [hereinafter sometimes referred to as "BarclaysAmerican"], and hereby amends its Answer by amending the title of said pleadings: "Answer and CounterClaim" and, further, by adding the following after the *ad damnum* clause:

COUNTERCLAIM

1.

On or about June 27, 1981, plaintiffs entered into a Retail Instalment Contract with Vintage Enterprises, Inc. in connection with a purchase of a mobile home, as is admitted in paragraph 4 of Plaintiff's Complaint. A copy of said contract is attached to plaintiffs' complaint as Exhibit "A".

2.

Said Retail Instalment Contract was subsequently assigned to defendant as is admitted in paragraph 6 of Plaintiff's Complaint.

3.

Plaintiffs are in default under said Retail Instalment Contract, as admitted on Exhibit "C" hereto.

4.

On or about September 3, 1982, defendant sent to plaintiffs a Notice of Right to Cure, a copy of which is attached hereto as Exhibit "B", which Notice was received by plaintiffs as demonstrated by the Return Receipt shown in Exhibit "B".

5.

In said Notice of Right to Cure BarclaysAmerican made demand on plaintiffs informing plaintiffs that if payment was not received by September 23, 1982 BarclaysAmerican would exercise all of its rights under the contract including the right to repossess any property held as collateral for the transaction and the right to hold plaintiffs personally responsible for any differences between the amount the property brings at the sale and the balance due on the credit transaction.

6.

In addition, plaintiffs are hereby notified that the Retail Instalment Contract contains a provision for payment of attorney's fees in the event defendant is required to enforce the provisions in said Retail Instalment Contract by an action at law or in equity. Said attorney's fees provision will be enforced unless plaintiffs pay the full amount due and owing within ten (10) days of their receipt of this counterclaim. Upon information and belief, defendant did not receive the said sums within 10 days of plaintiffs' receipt of this notice.

7.

On or about December 28, 1982, plaintiffs executed the document attached hereto as Exhibit "C", by which plaintiffs voluntarily acknowledged their default under the retail contract and relinquished their right to possession of the subject mobile home.

8.

Plaintiffs have acted in bad faith, have been subbornly [sic] litigious, and have caused defendant unnecessary trouble and expense in the bringing of this lawsuit especially after plaintiffs specifically acknowledged their default and relinquished possession of the mobile home as shown by Exhibit "C".

WHEREFORE, BarclaysAmerican respectfully prays that judgment be entered in its favor awarding it possession of the subject mobile home and for all sums legally under the Retail Instalment Contract due, including interest, plus all costs incurred in the bringing of this counterclaim and any and all costs incurred in the defense of this lawsuit including, reasonable attorney's fees as provided for in the Retail Instalment Contract and any other relief that the Court may deem just and proper.

Respectfully submitted,

MITCHELL, LOGGINS,
CAMPBELL & ELSBERRY

/s/ Douglas N. Campbell
Douglas N. Campbell

/s/ Elise M. Bloom
Elise M. Bloom

Suite 950, The Equitable Building
100 Peachtree Street
Atlanta, Georgia 30303
(404) 658-140

HARRISON, JOLLES & CRAIG, APC

/s/ Daniel J. Craig
Daniel J. Craig

525 Ellis Street
Augusta, Georgia 30901

EXHIBIT B

Barclays American/Credit, Inc.

Branch Office: 2621A Washington Road., Augusta, GA 30903

Branch Office Phone No.: (404) 737-4642

Your Account No. 37789333

Date of Your Contract/Loan 6/27/81 19___

Present Balance as of 8/3/82 19___ IS $ 44309.39

Arthur and Lillie Quiller
Route 3 Box 476
North Augusta, S.C. 29841

NOTICE OF RIGHT TO CURE

September 23, 1982 Is the LAST DAY FOR PAYMENT
(Date)

$ 268.43 Is the AMOUNT NOW DUE
(Amount)

You are late in making your payment(s). If you pay the AMOUNT NOW DUE (above), by the LAST DAY FOR PAYMENT (above), you may continue with the contract as though you were not late. If you do not pay by the date, we may exercise our rights under the law. These rights include the right to repossess any property held as collateral for this transaction and the right, in may instances, to hold you personally responsible for any differences between the amount the property brings in a sale and the balance due us on the credit transaction in question. If you are late again in making you payments, we may exercise our rights without sending you another notice like this one. If you have questions, write or telephone us promptly. Thanks for your cooperation.

/s/ Rick Murphy
Manager

FORM NO. 8504(S.C.)
Replaces 810

PREPARE IN DUPLICATE. INSERT IN WINDOW ENVELOPE. MAIL CERTIFIED-RETURN RECEIPT REQUESTED. RETAIN COPY & RECEIPT IN FILE.

EXHIBIT C

RELEASE

YEAR	MAKE	IDENTIFICATION NUMBER
1981 Liberty	56 × 24	2L1862XV

ACCOUNT NO.	DEALER NAME (IF APPLICABLE)
37789333	

TO: BarclaysAmerican/Credit, Inc. Party:
FINANCIAL INSTITUTION

I (We) are in default of the terms of the security instrument (hereinafter called Security Agreement) held by you covering the above collateral and, therefore, voluntarily surrender and release the above collateral to you for disposition in accordance with your remedies under the Security Agreement and applicable law. I have been informed that you are declaring all remaining installments, less any required rebate specified in my (our) contract or note, due and payable.

You are authorized and directed on my (our) behalf to cancel any insurance covering the collateral and apply any refund of premiums to the account.

I (We) acknowledge notification and hereby agree that the collateral will be disposed of in accordance with Georgia law and that any Notice of Sale, or other notice required by law, should be sent to me at my address as stated in the Retail Installment contract, or if at a different address, then at the address listed below.

I acknowledge that I have been furnished with a copy of this instrument, and that all personal contents have been removed from the collateral by the undersigned, and that

there is nothing therein to which I (we) will make or claim against BarclaysAmerican/Credit, Inc.

	X/s/ Lillie Mae Quiller
	Customer (Signature)
/s/ Daniel W.	Rt. 3 Box 474
Witness Dec. 28, 1982	Number, Street, City
	N.Augusta, Ga
	State, Zip
	/s/ Arthur Quiller
	Co-Signer or Co-Purchaser
	Rt. 3 Box 474
Witness	Number, Street, City
	N. Augusta, Ga
	State, Zip

Instructions: Complete all blanks. Retain the signed original in customer file and deliver a signed copy to customer and co-signer.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

ARTHUR QUILLER, LILLIE MAE QUILLER,
and all other persons similarly situated,

Plaintiffs

v.

BARCLAYSAMERICAN/CREDIT, INC.,

Defendant

CIVIL ACTION FILE NO. 183-87

AMENDMENT TO ANSWER

COMES NOW the defendant in the above-styled action and, pursuant to Rule 15 of the Federal Rules of Civil Procedure, hereby amends its Answer as a matter of right to include the following:

EIGHTH DEFENSE

Plaintiffs' claims are barred by the doctrine of Release.

NINTH DEFENSE

The law of South Carolina controls the validity of the mobile home purchase and the other matters referred to in plaintiffs' complaint.

TENTH DEFENSE

The provisions of Public Law 96-221, Title V, Sec. 501, March 31, 1980, 94 STAT 161 referred to in plaintiff's complaint are unconstitutional.

Respectfully submitted,

MITCHELL, LOGGINS,
CAMPBELL & ELSBERRY

/s/ Douglas N. Campbell
Douglas N. Campbell

/s/ Elise M. Bloom
Elise M. Bloom

Suite 950, The Equitable Building
100 Peachtree Street
Atlanta, Georgia 30303
(404) 658-140

APPENDIX C

IN THE
SUPERIOR COURT OF RICHMOND COUNTY
STATE OF GEORGIA

ARTHUR QUILLER, LILLIE MAE QUILLER,
And All Other Persons Similarly Situated,

Plaintiffs,

VS.

BARCLAYSAMERICAN/CREDIT, INC.,

Defendant.

CIVIL ACTION FILE NO. 9195-C

RULE NISI

The attached verified Complaint having been read and considered, let the same be filed.

Defendant is hereby ordered to show cause before the Honorable Albert M. Pickett, Judge of the Superior Court of the Augusta Judicial Circuit, on the 3rd Floor of the Augusta-Richmond County Municipal Building, Augusta, Georgia, on the 21st day of March, 1983, at 11:00 o'clock A.M., why Defendant should not be temporarily restrained and preliminarily enjoined from collecting monthly payments from any potential members of this class on any contracts that are tainted as alleged by the Plaintiffs, why the named Plaintiffs and the other members of this class should not be allowed to make their payments pending the final resolution of this case into the registry of this Court, and why the Defendant should not be preliminarily enjoined from proceeding to non-judicially foreclose any mobile home or manufactured home from the members of Plaintiffs' class without prior judicial supervision of said foreclosures. At said hearing, Defendant is hereby ordered to

produce financial information so as to assure this Court that if this action is certified as a class action and if the Plaintiffs are entitled to the relief to which they are demanding that the Defendant would be able to refund any payments currently being made to the Defendant by the members of this class.

Pending said hearing, the Defendant is temporarily restrained and enjoined with proceeding to repossess or foreclose any mobile home from any individual who falls within the definition of Plaintiffs' class without prior approval of this Court.

This *22nd* day of February, 1983.

/s/ Franklin H. Pierce
Judge, Superior Court
Augusta Judicial Circuit

Presented by;

Jay M. Sawilowsky
Attorney for Plaintiffs

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

ARTHUR QUILLER, LILLIE MAE QUILLER,
and all other persons similarly situated,

Plaintiff,

v.

BARCLAYSAMERICAN/CREDIT, INC.,

Defendant.

CIVIL ACTION FILE NO. 183-87

ORDER

Plaintiffs' Motion for Preliminary Injunction having come on regularly for hearing before the Court without a jury, and the Court having considered the evidence presented by both sides and the argument of counsel for all parties, it is hereby

ORDERED that as to all current customers of Defendant who are parties to retail instalment contracts held by Defendant pursuant to which new mobile homes were purchased from the effective date of the regulations promulgated by the Federal Home Loan Bank Board pursuant to the Federal Preemption Statute, referred to by Plaintiffs in their Complaint, through February 23, 1983, and to which purchase, were it not for the existence of said Federal Preemption Statute, the Georgia Motor Vehicle Sales Finance Act would otherwise have applied [said individuals being hereinafter referred to as the "Group"], Defendant will give the thirty (30)-day notice as required by 12 CFR § 590.4(h) at least thirty (30) days prior to Defendant taking any action to repossess or foreclose upon any

mobile home secured by any such retail instalment contract to which any member of the Group is a party; and it is further

ORDERED that as to any such mobile home of a member of the Group which Defendant, after sending such notice and prior to the customer's cure of default, Defendant decides actually to foreclose or which Defendant decides actually to repossess, Defendant will send a copy of such previously sent notice and a copy of the loan contract/security agreement to Plaintiffs' counsel [hereinafter "Mr. Long"], John B. Long, at 1500 Georgia Railroad Bank Building, Augusta, GA 30910, prior to actual foreclosure or repossession. Mr. Long will then actually notify Defendant's counsel, Douglas N. Campbell or Elise M. Bloom, 950 The Equitable Building, 100 Peachtree St., Atlanta, GA 30303 (telephone number 404-658-1400), by mail or telephone so that such notice is actually received by said Defendant's counsel not more than ten (10) days after the postmarked date of the copy of the notice sent to Mr. Long, of any objection to such repossession or foreclosure. If objection is made and no agreement can be reached, Mr. Long will apply to the Court in writing to restrain such foreclosure or repossession not more than fifteen (15) days after the postmarked date of said notice to Mr. Long. Defendant is not restrained from any repossession or foreclosure by this Order.

In the event of abandonment or other extreme circumstances, the Defendant will actually notify Mr. Long by letter received by Mr. Long or by telephone of its intent to repossess or foreclose and if Mr. Long objects, he will actually so notify the aforesaid Defendant's counsel by telephone or in writing actually received by Defendant's counsel, and if no agreement can be reached, file a written application to the Court to restrain said foreclosure or repossession, both not more than two (2) business days after his receipt of Defendant's notice to him.

Mr. Long will under no circumstances contact any member of the class except the Quillers for any reason without the express prior written consent of the Court.

Any documents or information which come into the possession of counsel for Plaintiffs pursuant to this Order will be

treated as absolutely confidential and will never be used by them or the Quillers in any subsequent litigation without the express prior written consent of the Court.

This *11th* day of May, 1983.

/s/ Dudley J. Bowen, Jr.
Judge, United States District Court,
Southern District of Georgia

APPENDIX E

WITKOWSKI, WEINER, McCAFFREY and BRODSKY, P.C.

October 7, 1982

Thomas P. Vartanian, Esq.
General Counsel
Federal Home Loan Bank Board
1700 G Street, N.W.
Washington, D.C. 20552

Re: Manufactured Housing Consumer Protection Provisions —Repossession Notice (§ 590.4(h))

Dear Mr. Vartanian:

We are writing on behalf of the General Electric Credit Corporation ("GECC") to request that the Federal Home Loan Bank Board (the "FHLBB" or "Bank Board") address itself to an issue which has arisen in litigation and which is described in the paragraphs below. We further request that the Bank Board publish its response in a formal interpretation pursuant to 12 C.F.R. § 590.5 under the authority vested in it by § 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA" or "the Act").

Statement of Facts — The litigation arose in the state of Arkansas out of the following facts and circumstances. The defendants in the case, on or about May 14, 1981, purchased a mobile home under a retail installment sales contract that was assigned to the plaintiff, our client. The credit sale was secured by the mobile home itself, and the rate upon which the finance charge was calculated under the contract was 17.8 percent, a rate in excess of that permitted under Arkansas state law. However, the plaintiff had carefully structured the transaction to comply with the Bank Board's consumer protection regulations regarding manufactured home loans and credit sales. (12 C.F.R. § 590.4). Under DIDMCA such compliance is a prerequisite for the exemption of these credit transactions from state usury laws (§ 501(a)).

The defendants defaulted in payment under the contract, leaving a substantial unpaid balance outstanding. Upon default, plaintiff gave written notice 30 days prior to acceleration of the debt and repossession. This notice was given on the form and in the manner prescribed by 12 C.F.R. § 590.4(h)(2). Reference to this notice requirement was initially made in the contract in the following manner:

> In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder, less the unearned portion of the *FINANCE CHARGE* calculated by the Actuarial Method, provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.

At the ensuing possessory hearing, defendant contended that the contract was usurious under Arkansas law and, therefore, unenforceable. GECC contended that the requirements of the federal preemption of state usury laws for mobile home credit sales under § 501 of DIDMCA had been met and, therefore, the contract was enforceable.

Lest the Bank Board hesitate to issue an interpretation that may influence the course of litigation on the grounds that material facts are in dispute, it should be understood that the material facts of this case were stipulated to by the parties at the hearing. There is no dispute that (1) the contract did not expressly disclose all of the facets of the borrower's right to a 30-day notice, and (2) that the 30-day notice was actually given prior to repossession. The only issue to be decided was whether GECC was required to expressly include as a term of the contract the right of the borrower to a 30-day notice in order to take advantage of the federal rate preemption under DIDMCA.

Despite the fact that the 30-day notice had been given as prescribed, the presiding judge made a preliminary finding that a loan or mobile home credit sale does not qualify

for federal preemption without an explicit contractual disclosure to the consumer of a 30-day notice of his or her right to cure default. Because the contract in this case did not explicitly detail all of the consumer's rights upon default, including the 30 day right to cure, the judge ruled that this credit sale did not qualify for the preemption of the state usury ceiling under § 501 of DIDMCA and 12 C.F.R. § 590.4(h).

Issue — Our question to the Bank Board flows from this ruling. Must a 30-day notice of default and right to cure default be a term of a consumer's credit contract for the purchase of a manufactured home in order for the transaction to qualify for federal preemption pursuant to § 501 of DIDMCA?

ARGUMENT

Introduction — It is our belief that this question should be answered in the negative. We respectfully submit that there is nothing in the Conference Report to § 501 of the Act, the Act itself, the Bank Board's regulations or subsequent interpretations thereof that would require that "notice" of the 30-day cure requirement be contained in the credit contract. We assert, rather, that the 30-day notice provision applies only when default occurs and that any interpretation to the contrary — in the absence of an express legislative or regulatory directive requiring its inclusion — jeopardizes the enforceability of thousands of existing contracts and undermines the safety and soundness of the manufactured housing finance industry.

We also submit that the consumer in this case (as well as any similarly situated individual) neither suffered any harm nor was deprived of any benefit by not having the 30-day notice provision reflected in the credit contract. The consumer did in fact receive a notice of the right to cure. The notice was given in a timely manner on the exact form prescribed by § 590.4(h)(2). All other consumer protections required by the Bank Board were provided. Under

these circumstances, the consumer would have had no greater rights or benefits had he received notice of the 30-day right to cure in the credit contract.

Text of § 501 — The text of § 501 states that the exemption from state usury laws for credit transactions secured by a first lien on a manufactured home will not apply "unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board" (§ 501(4)(c)). That section further states that the Bank Board's regulations must include three enumerated provisions, among them, a "30-day notice prior to instituting any action leading to repossession or foreclosure (*except in the case of abandonment or other extreme circumstances*)." (Emphasis added.)

There is nothing in this statutory language which implies an affirmative requirement to have the 30-day notice reflected in the credit contract. On the contrary, the notice requirement exception applicable to abandonment and other extreme circumstances presumes that the notice is to be given exclusively at the time of default and not at the beginning of the legal relationship between the parties[1]. If Congress had intended that notice of the 30-

[1]The result enunciated in the judge's preliminary conclusion may have been premised in part on the notion that a "loan" is either usurious or in compliance at the time of consummation. However, the concept of "loan" involves the entire transaction, from application through collection, and is not merely limited to the execution of a contract. A loan can be usurious, even though the "contract" is entirely legal. For example, assume that a precomputed interest loan is consummated at the maximum rate allowed under state law. Upon prepayment in full before maturity, state law requires that a rebate of any unearned finance charges calculated under the actuarial method is required. If unearned finance charges were rebated under the "Rule of 78's" method rather than under the actuarial method, usurious interest would be collected. Such a transaction would be usurious (1) even if the contract was silent as to the rebate method, and (2) even if the contract called for the use of an actuarial rebate. On the other hand, if an actuarial rebate is actually per-

day right was to be given in the credit contract as well as at the time of default, it would be senseless to provide an exception for "abandonment" or "extreme circumstances," because such events could not be foreseen at the time of the signing of the contract.

The statutory language clearly indicates that before a creditor's duty to give the notice arises, default must occur. No duty would arise unless and until default occurred. However, even this duty would be excused if abandonment or other extreme circumstances occurred. Because abandonment and extreme circumstances cannot be predicted at consummation, the disclosure can only take place at a later period in time.

In the contested transactions, the notice required by § 590.4(h) was provided in connection with the "loan," even though the "contract" did not expressly disclose the 30-day period. Clearly, the "loan" did "contain" the required consumer safeguards. (*See* 12 C.F.R. § 590.3(a)(2)(iii).

Conference Report — In the Manufactured Home Financing section of the Joint Explanatory Statement of the Committee of Conference (H.R. Rep. No. 96-842, at 79 (1980)), the conferees made no mention whatsoever of the 30-day notice requirement. The Conference Report accompanying the Act provides that the consumer safeguards should not preempt similar state laws that are more protective of the consumer. With regard to the contested case, the state of Arkansas has no statutory requirement directing a creditor to give any type of notice upon default on a loan and thus federal law exclusively applies.

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formed, the transaction would not be usurious, even though the contract was silent as to the rebate method. Clearly, subsequent events affect usury determinations, the terms — or lack of terms — in the contract notwithstanding.

Bank Board Regulations — The FHLBB's consumer protection regulations for federally related loans, mortgages, credit sales and advances secured by first liens on residential manufactured homes are set forth in 12 C.F.R. § 590.4. The 30-day notice provision contained therein expands considerably the requirement stated in § 501 of the Act. In addition to a mere notice prior to commencement of repossession, the regulation prescribes a standard form for the notice which includes, most notably, a provision giving the consumer a right to cure the default within 30 days (12 C.F.R. § 590.4(h)).

The regulation states that such notice must be given prior to an exercise of the creditor's rights upon the consumer's default. There is nothing in § 590.4(h) (or the regulatory preambles to the Bank Board's rule and its subsequent amendments) that would lead one to believe that disclosure of the notice requirement in the credit contract is either presumed, anticipated, intended, or required. We note, moreover, that the statutory exemption from the notice requirement for "abandonment" or "extreme circumstances" is reflected in the regulation. The inferences that flow from the statutory exception apply equally here. The fact that the entire provision is prefaced with the exception — "Except in the case of abandonment or other extreme circumstances . . ." — indicates that no affirmative notice or disclosure duties are placed on the creditor if the exception applies.

Section 590.4(h) also provides an additional exception that cannot be foreseen at the time of the signing of the credit contract. It provides: "The debtor is not entitled to notice of default more than twice in any one-year period." As in the case of abandonment or other extreme circumstances, it appears that because the circumstance of three defaults in a one-year period is not :forseeable [sic], any contractual reference to the debtor's right to notice could not have been intended by the Bank Board.

If the specific requirement of the 30-day notice as set forth in § 590.4(h) is determined to be required in the credit contract, compliance with such an interpretation would mandate that a clause similar to the following be part of every manufactured housing credit contract that relies on the § 501 preemption. Such a clause would be so fraught with conditions and exceptions in order to adequately state the scope of the right as to make it vague and confusing to the consumer. At a minimum, it would have to include the following information:

If the Buyer defaults in any of the terms of this contract giving rise to acceleration and repossession, the Buyer shall be given 30-days notice of the right to cure the default before Seller is permitted to exercise his right to accelerate this obligation and foreclose on the secured property; provided, however, that in the case of abandonment of the manufactured home or other extreme circumstance, or in the event that the Buyer has already defaulted on two prior occasions within a one year period prior to the instant default and in connection with each such prior default :Sellor [sic] has given the Buyer a notice of the right to cure the default in a manner that is in compliance with this provision, no notice shall be given.

Despite this law firm's substantial involvement in the area of manufactured housing finance, we have never encountered such an interpretation of § 590.4(h) nor a credit contract that would be in compliance with such a requirement.

An interpretation that would require a contractual clause that specifically reflects the provisions of § 590.4(h) to be included in the contract would result in an ex post facto requirement that would instantly expose the manufactured housing finance industry to overwhelming liability. Moreover, this burden to the industry would not be counter-balanced by a corresponding benefit to consumers. As noted above, the inclusion of a contractual clause

accurately reflecting the regulatory provisions and exceptions would be so convoluted and vague that it would have little meaning to consumers[2]. Nor would the creditor be able to simplify the clause by leaving out the circumstances under which the exceptions to the notice requirement apply, because such omissions either would make the contract vague or would subject creditors to contractual requirements broader than those set out in the regulation. If a creditor were to merely state that a 30-day notice is required, the creditor would be contractually bound to give such notice even under circumstances in which the Bank Board's regulations would otherwise permit the creditor to exercise rights upon default without giving notice.

We also note that when the Bank Board intended creditors to include other terms and conditions in the contract, it expressly set forth the requirements in its regulations. For example, 12 C.F.R. § 590.4(d), which requires that the debtor be permitted to prepay the loan at any time without penalty, expressly states that "[t]he right to prepay shall be disclosed in the loan contract . . . ." Subsection (e), regarding balloon payments, permits balloon payments if, inter alia, such payments are agreed to in writing and "the agreement sets out the amounts and due dates of each scheduled installment." The late charge provision,

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[2]To the extent this notice is intended to "disclose" to the consumer his rights upon default, the amount of detailed and conditioned information required to accurately inform the consumer of his rights would inject precisely the type of "informational overload" into the contract that Congress attempted to eliminate in Title VI of DIDMCA (the "Truth in Lending Simplification and Reform Act"). Moreover, an interpretation requiring such an explicit statement of the right to be included as an express term of the contract — when the disclosure provided following default clearly accomplishes all statutory objectives — erects a hypertechnical barrier to creditor compliance. Such complexity is all too reminiscent of the compliance burdens which the Truth in Lending Act and Regulation Z placed on creditors before Congress wisely enacted simplifying amendments to facilitate compliance, limit :cereditor [sic] liability and prevent information overload.

subsection (f), provides that "[n]o late charge may be assessed, imposed, or collected unless provided for by written contract between the creditor and the debtor." Finally, subsection (g), regarding deferral fees, states that "agreements providing for deferral of all or part of one or more installments shall be in writing, signed by the parties . . ." and then sets forth the necessary elements of that agreement.

In contrast, subsection (h), which requires the 30-day notice before repossession, foreclosure or acceleration, is noticeably silent with regard to any requirement that the right be specified in the contract. This subsection merely requires that the 30-day notice be provided before repossession, foreclosure [sic] or acceleration. We believe that the Bank Board's omission of any explicit requirement that the 30-day notice be a term of the contract, when it had explicitly required other consumer protections to be written into the contract (and in fact did so in the four preceding subsections of the regulation), clearly demonstrates that the Bank Board did not intend to impose a requirement that the borrower's right to a 30-day notice be a contractual term.

We request that the Bank Board clarify the ambiguity created by the Arkansas court and reaffirm its intent that such a contractual term is not required.

Conclusion — Based upon the foregoing analysis of all relevant sources of interpretation with regard to the 30-day notice requirement, we believe that:

(1) the language of the regulation and the statute do not indicate that a 30-day notice of default and right to cure default must be a term of a consumer's credit contract for the purchase of a manufactured home in order for the transaction to qualify for federal preemption;

(2) no greater rights or benefits would inure to the benefit to [sic] consumers if such a provision were required in the contract;

(3) relying on the absence of an express requirement that such a notice be contained in the contract, the manufactured housing credit industry has consummated thousands of contracts relying upon the § 501 preemption without such a notice; and

(4) an interpretation to the effect that the statute or regulation implicitly requires such a provision in manufactured housing credit contracts would jeopardize the legality and enforceability of thousands of existing contracts, and would impose great financial liability upon the manufactured housing credit industry.

Accordingly, we request that the Bank Board issue an interpretation holding that such a contractual term is not required to qualify for the preemption pursuant to § 501 of the Act, so long as an appropriate notice (if required) is issued by the creditor to the Buyer at least 30-days prior to repossession, foreclosure or acceleration upon default and all other consumer safeguards prescribed by the regulation are provided.

We trust that the above material fully presents the issue faced by our client. If we can be of any further assistance in this regard, please do not hesitate to call.

Sincerely,

/s/ D. Edwin Schmelzer

D. Edwin Schmelzer

DES/am/4033B/805

cc: Windy Samuel, Esq.

HAND DELIVERED

APPENDIX F

NIXON, YOW, WALLER & CAPERS

May 11, 1983

Mr. Thomas B. Vartanian
General Counsel
Federal Home Loan Bank Board
1700 G Street, N. W.
Washington, D. C. 20552

Dear Mr. Vartanian:

I am currently involved in some litigation representing Plaintiffs in lawsuits pending in the United States District Court for the Southern District of Georgia against mobile home and manufactured home lenders. The issue is whether or not the Georgia Motor Vehicle Sales Finance Act controls the finance charges that could be charged on these transactions or whether or not this state law has been preempted by the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. 96-221, § 501, 94 Stat. 161-63 (1980). My reading of the Act in the Consumer Protection Regulations promulgated by the Federal Home Loan Bank Board, 12 C.F.R. § 590.4 indicates that, in part, the issue will be controlled by whether or not the lender elected to grant these consumers those consumer protection rights that must be granted if a certain transaction is to fall under federal law and if the state laws governing finance charges are to be preempted. I have read your opinion of October 28, 1982, which responded to a letter of October 7th, requesting an interpretation of the Board regulation § 590.4(h). I would appreciate it very much if you would kindly send me any other opinions of the Federal Home Loan Bank Board that have been issued concerning the Depository Institutions Deregulation and Monetary Control Act of 1980, or the regulations set forth in 12 C.F.R. § 590.4.

Due to the fact that lawsuits are currently pending, I believe that the Federal Home Loan Bank Board will be asked to give certain opinions concerning the meaning of certain provisions

of the consumer protection regulation promulgated by the Board and set forth in 12 C.F.R. § 590.4. Due to that fact, and due to the fact that certain opinions issued by the Federal Home Loan Bank Board may be used by the Defendants in defending the litigation, I would appreciate it very much if you would kindly advise me of any request for an interpretation of the consumer protection regulation set forth in 12 C.F.R. § 590.4 which are forthcoming.

Very truly yours,

/s/ John B. Long

John B. Long

JBL/bjb

cc: Mr. David E. Hudson
Mr. Thomas W. Tucker
Mr. Jay M. Sawilowsky, Jr.
with/enclosures

APPENDIX G

WITKOWSKI, WEINER, McCAFFREY and BRODSKY, P.C.

August 11, 1983

HAND DELIVERED

Ralph W. Christy, Esq.
Acting General Counsel
Federal Home Loan Bank Board
1700 G Street, N.W.
Washington, D.C. 20552

Re: Manufactured Housing Consumer Protection Provisions—*Prepayment Disclosure (590.4(d))*

Dear Mr. Christy:

We are writing on behalf of Citicorp Acceptance Company, Inc. ("CAC"), to request that the Federal Home Loan Bank Board (the "FHLBB" or "Bank Board") address itself to an issue which has arisen in litigation and which is described in the paragraphs below.[1] We further request that the Bank Board: (1) publish its response in a formal interpretation pursuant to 12 C.F.R. § 590.5 under the authority vested in it by Section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA" or "the Act") and (2) file an amicus brief with the United States District Court for the Southern District of Georgia.

Statement of Facts—The litigation arose in the state of Georgia out of the following facts and circumstances. Plaintiffs

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[1]As you may know, we met with Patrick Doyle, Peter Barnett and Harvey Simon on May 3, 1982 [sic (1983)], to discuss a similarly technical issue under § 590.4 that had arisen in connection with this litigation. At that time, we represented three defendants, each faced with class action liability. Since then, two of these defendants have been dismissed from this litigation by the District Court, and appeal has been taken by plaintiffs' counsel. Plaintiffs motion for summary judgment has been granted against the third defendant, CAC, and an order to enter a judgment is pending before the court.

purchased a mobile home under a retail installment sales contract that was assigned to the defendant, our client. The credit sale was secured by the mobile home and the rate upon which the finance charge was calculated under the contract was in excess of the rate permitted under the Georgia Motor Vehicle Sales Finance Act ("GMVSFA").

The defendant had carefully structured the transaction to comply with the Bank Board's consumer protection regulations regarding manufactured home loans and credit sales (12 C.F.R. § 590.4), and in fact submitted detailed comments to the Bank Board in connection with these regulations. Under DIDMCA, compliance with the Bank Board regulations is a prerequisite for the exemption of these credit transactions from state usury laws under § 501(c) of the Act.

In late March, 1983, plaintiffs brought an action for themselves and all other persons similarly situated against Citicorp Homeowners, Inc. and its successor in interest on these contracts, CAC, alleging usury violations under GMVSFA. Following various discovery and procedural steps, the United States District Court for the Southern District of Georgia, Augusta Division, Judge Dudley H. Bowen, Jr., heard oral argument of counsel on procedural issues. After reviewing the motions, the pleadings, the arguments of counsel for the parties at a hearing on July 25, 1983, affidavits of the parties, and statements of fact, the court granted summary judgment in favor of plaintiffs and against our client, and requested that counsel submit an order so that judgment could be entered. The judge has yet to issue any final order, but may take such action as early as Monday, August 15, 1983.

A primary point of contention in the litigation involved the disclosure requirements of § 590.4(d), which provides as follows:

> (d) *Prepayment penalties.* A debtor may prepay in full or in part the unpaid balance of the loan at any time without penalty. The right to prepay shall be disclosed

> in the loan contract in type larger than that used *for the body of the document.* (Emphasis added).

At the top of the contract involved is [sic] this dispute, a copy of which is attached, defendant had printed in boldface type a statement that "Buyer May Prepay the Unpaid Balance on this Contract in Whole or in Part at Any Time Without Penalty." Moreover, in the body of the contract defendant used virtually identical language in regular size type following a boldface heading "Prepayment Rebate" to establish the contractual rights of the parties.

Although none of the parties have seen the written rationale of the judge, it is our understanding that at the July 25, 1983, hearing the judge determined that plaintiffs should prevail on the merits.

It is noteworthy that the issue before the court is not whether the right to prepay had been disclosed, but whether it had been disclosed "in type larger than that used for the body of the document." In deciding against the defendant, the judge apparently concluded: that the federally required disclosures "FINANCE CHARGE" and "ANNUAL PERCENTAGE RATE" were larger than the prepayment disclosure; that other printed words, such as captions, were clearly larger than the prepayment disclosure; and that the "Holder in Due Course" disclosure required by the Federal Trade Commission was in a larger type font. Therefore, considering the contract in its entirety, the court concluded that the prepayment disclosure was not printed in type larger "than that used for the body of the document."

Issue—Our question to the Bank Board flows from this ruling: in order for a transaction to qualify for federal preemption under § 501(c) of DIDMCA, must the prepayment disclosure be in a type size larger than all other information on the consumer credit contract, including captions, creditor identification, and state and federally prescribed disclosures that must also be conspicuously disclosed, or must the disclosure be

larger only than the general body type used to print the general terms and conditions of the contract?

ARGUMENT

Introduction—It is our belief that the latter standard is the appropriate interpretation of § 590.4(d). We submit that there is nothing in the Conference Report to § 501 of the Act, the Act itself, or the Bank Board's Regulations or subsequent Interpretations that would require that the prepayment disclosure be in larger type than all other information contained on the form. We assert, rather, that the purpose for requiring the prepayment right to be disclosed in a type size larger than the body of the document was merely to assure that the disclosure of this right was not buried in the fine print of the contract. The impending ruling issued by the Southern District of Georgia needlessly jeopardizes enforceability of thousands of existing contracts and undermines the safety and soundness of creditors in the manufactured housing finance industry, including banks, savings and loan associations, mortgage bankers and similar entities that purchase such contracts.

We also submit that the consumers in this case (as well as all similarly situated individuals) neither suffered any harm nor were deprived of any benefit by not having the right disclosed in "giant" type. The right to prepayment without penalty was the first piece of substantive information presented on the form, and it was deliberately given such a prominent position in a good faith effort to comply with the regulatory provisions of § 590.4. The text of this disclosure was printed in boldface type and was accentuated by the use of uppercase letters for all significant words. Moreover, the prepayment right was set forth in at least one other portion of the contract in language consistent with the text of the disclosure.

In light of these compliance precautions and special efforts to assure that borrower's would be apprised of their prepayment rights, it is clear that the consumer's rights have not been impaired, nor is there any reasonable argument that any great-

er benefit would have flowed to the borrowers if the disclosure had been printed in larger type. Therefore, based on a hypertechnical and overly broad construction of the regulatory requirement, the impending decision works an unfair penalty upon the defendant without any commensurate benefit to the plaintiff and without furthering any societal interests.

Such a result would convert § 501 into a universal option to bring lawsuits wholly unrelated to the purpose of the disclosures involved. As in this case, the allegations would involve nothing more than hypertechnical violations of matters that do not really bear on consumer protection and merely impose a penalty on creditors unable to chart the shifting shoals created by the constant flow of court determinations. This inappropriate use of the Act offends public policy and results in an increased cost of credit that must be borne by all borrowers.

Text of Section 501—The text of § 501 states that the exemption from state usury laws for credit transactions secured by a first lien on a manufactured home will not apply "unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with the consumer protection provisions specified in regulations described by the Federal Home Loan Bank Board." (§ 501(c) of the Act). That section further states that the Bank Board's regulations shall contain specifically enumerated consumer protection provisions, including the right to prepay at any time without penalty.

Please note the statutory language is silent as to disclosure of these consumer protection provisions as well as any type size requirements relating to any such disclosure.

Conference Report—In the Manufactured Home Financing section of the Joint Explanatory Statement of the Committee of Conference (H.R. Rep. No. 96-842, at 79 (1980)), the conferees made no mention of the need to disclose prepayment rights, let alone requiring conspicuousness of any disclosures. The Conference Report provides that the federally prescribed consumer safeguards should not preempt similar state laws that are more protective of the consumer. However, we note that there is no issue under Georgia law regarding this requirement in the litigation.

Bank Board Regulations—As finally adopted, The FHLBB's consumer protection regulations for federally related loans, mortgages, credit sales and advances secured by first liens on residential manufactured homes are set forth in 12 C.F.R. § 590.4. Subparagraph (d) of that section requires that the disclosure of the right to prepay without penalty "be disclosed in the loan contract in type larger than that used for the body of the document."

In its proposed implementing regulations, the Bank Board had proposed that the right to prepay be "conspicuously disclosed in the loan contract." See 45 Fed. Reg. 31124 (May 12, 1980). In the regulatory preamble, the Bank Board merely noted that a lender could not assess penalties in the event a borrower choose [sic] to prepay in full the unpaid balance of a mobile home loan, and that the Board believed such penalties would deter borrowers from refinancing or selling mobile homes. The initial regulatory preamble to the proposal did not elaborate as to what was meant by its "conspicuous" disclosure requirement.

During the ensuing public comment period, several creditors (including the defendant) raised issues as to the "conspicuous" disclosure requirement. The Bank Board took note of these comments, and in the preamble to its final regulations stated that:

> Respondents also took issue with the requirement that the right to prepay without penalty be "conspicuously" printed in the loan document. It was reasoned that, since the word "conspicuous" has been litigated in connection with a requirement of Federal Reserve Regulation Z (12 C.F.R. 226.8(b)), the Board's additional requirement might give rise to questions whether the print must be as large as, same as, or larger than that required by Regulation Z. 45 *Fed. Reg.* 43684 (June 30, 1980).

The prescience of this statement is remarkable, because the very result the Bank Board sought to avoid became the trivial exercise in which the defendants in this case, as well as the court, were forced to indulge. Ironically, the avoidance of such

hypertechnical litigation, which we perceive to have been in the forefront of the Board's decision in this matter and which was the theme in Title VI of DIDMCA,[2] threatens to reingulf the credit industry and the judicial system, if the court's decision in this case is made without guidance from the regulatory agency that implemented the statutory requirement.

We submit that the Board had no intention of promulgating a requirement that the print had to be as large as, the same size as, or larger than other disclosures that are required to be more conspicuous under state or federal law. Therefore, there was no intent that the prepayment disclosure be in the largest type used anywhere on the contract.

Conspicuousness and type-size requirements abound under state and federal law. For example:

- The Federal Truth in Lending Act requires that two disclosures, the "FINANCE CHARGE" and "ANNUAL PERCENTAGE RATE," be disclosed more conspicuously than other information in the disclosure statement;

- Certain federally prescribed disclosures, such as the Federal Trade Commission's "Holder in Due Course" notice, must be printed in at least ten-point bold face type in all capital letters;

- Certain state-prescribed disclosures (such as those frequently involving property damage insurance, liability insurance, instructions not to sign a contract if blank spaces are contained in it and similar provisions) require specific type fonts and sizes ranging from 8-18 point;

- Creditors frequently use art work on the form, or will preprint, type or write by hand numbers and symbols (such as dollar or percentage signs) and use large type

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[2]Title VI of DIDMCA contained the "Truth in Lending Simplification and Reform Act."

to identify themselves (typically displayed at the top of forms).

This competition for more conspicuous disclosure places creditors in a "Catch-22"-type dilemma. To make the prepayment disclosure larger than other federally required disclosures (such as Truth-in-Lending) or state-required disclosures (such as notices to the buyer) could result in penalties for violation of those provisions. On the other hand, to make those disclosures larger would create a usury violation under the hypertechnical and unnecessarily expansive reading given the prepayment disclosure requirement by the District Court.

The Board itself indicated that it wanted to avoid such a judicial morass. The regulatory preamble to the Board's final regulation concluded:

> As for the requirement that the right to prepay be "conspicuously" printed on the loan contract, the Board agrees that this may be potentially troublesome. Therefore, the requirement is changed so that type-size larger than that used for the body of the loan document may be used to call attention to this provision.

We respectfully request that the Bank Board clarify the ambiguity created by the Southern District of Georgia and reaffirm its intent that the type-size required for this disclosure need be larger only than the general body type used to print the general terms and conditions of the contract.

Conclusion—Based on the foregoing analysis and the relevant sources of interpretation with regard to the prepayment disclosure, we submit that:

(1) Any method of disclosure using type larger than the body of the contract is sufficient to satisfy this regulatory requirement;

(2) That the words "body of the document" mean the text of the contractual provisions and terms and conditions set forth therein, exclusive of information such as headings, captions, typed or written information, symbols, artwork, state and federally required dis-

closures and notices, and the identity of the creditor or logo associated with it.

(3) That the purpose of the regulatory requirement is to draw attention to the statutorily and regulatorily protected rights. To the extent that the lender draws attention to those rights through larger type (either by size or by using bold-face upper and lower case letters in lieu of standard body type in the contract), that the conspicuousness requirement of § 590.4(d) has been met.

(4) That there is no requirement that the disclosure be in the largest type size used on the form, as long as it is larger than the type used in the body of the contract except for headings and related information highlighted earlier.

Accordingly, to resolve this problem and clarify the meaning of this requirement, we request that the Bank Board: (1) issue an interpretation and (2) file an amicus brief with the United States District Court for the Southern District of Georgia.

We apologize for the delay in coming to the Bank Board. The intent of the Court became clear only a short time ago, and our client has been attempting to determine the basis of the judge's determination. However, because of the exigencies involved, we would be most appreciative of a prompt response.

We trust the above material fully presents the issue faced by our client. If we can be of further assistance in this regard, please do not hesitate to call.

Sincerely,

/s/ D. Edwin Schmelzer

D. Edwin Schmelzer

DES/sg/8336B-242

cc: Patrick A. Doyle, Esq.
Wendy A. Samuels, Esq.
Harvey Simon, Esq.
Peter Barnett, Esq.

Attachment

APPENDIX H

WITKOWSKI, WEINER, McCAFFREY and BRODSKY, P.C.

August 12, 1983

HAND DELIVERED

John E. Gunther, Esq.
Deputy Director, Litigation Division
Office of General Counsel
Federal Home Loan Bank Board
1700 G Street, NW
Washington, D.C. 20552

Re: Usury Preemption Class Action in Georgia

Dear Mr. Gunther:

I am writing to follow up on our phone conversation of this morning in which you requested further explanation and support for a point made in our letter of May 11, 1983 to the Board's Acting General Counsel. Specifically, we had indicated in that letter that the pending ruling of Judge Bowen on the prominence of the "prepayment without penalty" disclosure required by 12 C.F.R. § 590.4(d) would place creditors in a "Catch-22" type position, in that if they made the prepayment without penalty disclosure larger than any other type in their contract documents they would violate other federal and state law disclosure requirements.

With respect to other federally required disclosures, we submit the following:

Prior to October 1, 1982 (the date on which the Truth in Lending Simplification and Reform Act amendments became effective and the relevant period with regard to the execution of the contracts at issue), the Truth in Lending Act as implemented by Regulation Z required the terms Annual Percentage Rate and Finance Charge to be printed in a type more conspicuous than other terminology required to be disclosed by the Regulation. See: the 1981 version of 12 C.F.R. § 226.6(a).

Under the same version of Regulation Z, creditors were required to disclose if a penalty would be imposed for prepayment of the obligation. See: the 1981 version of 12 C.F.R. 226.8(b)(6). Thus prepayment penalty information was a required Regulation Z disclosure which, in accordance with the general provisions of the Regulation cited above, was required to be disclosed in a less conspicuous manner than the Annual Percentage Rate or Finance Charge. Printing the prepayment penalty information in such larger type constituted an automatic violation of Truth In Lending and under the terms of 15 U.S.C. 1640(a) at that time subjected creditors to statutory damages of up to $500,000 or one percent of their net worth (whichever is less) plus the recoupment of plaintiff's court costs and attorney's fees in connection with any successful action.

It was this concern that prompted at least four creditor commenters on the Bank Board's proposed regulations implementing section 501(c) to urge the Board to drop its earlier "conspicuous" disclosure requirement. (Those comments are included in the materials that we submitted to you on August 11, 1983.) The same issue likewise prompted Citicorp's decision on the type size of its prepayment without penalty disclosure; you will note that the type for the prepayment disclosure, while larger than the body of the contract text, is less prominent than that used to disclose the Annual Percentage Rate and Finance Charge.

With regard to similarly conflicting state required disclosure requirements, we are continuing our research and will provide you with the results as soon as they are available. However, I believe that any state disclosure provision merely requiring its own type size to be as prominent as any other disclosure given would clearly violate Judge Bowen's pending interpretation of § 590.4(d).

We trust that this is responsive to your request. Should you have further questions or need copies of now-dated Regulation Z provisions, don't hesitate to call. Again, we thank you for your prompt and courteous attention to these issues.

Sincerely,

/s/ D. Edwin Schmelzer

D. Edwin Schmelzer

DES/mkp
8369B/242

APPENDIX I

FEDERAL HOME LOAN BANK BOARD

December 20, 1983

John B. Long, Esq.
Nixon, Yow, Waller & Capers
1500 Georgia Railroad Bank Building
Augusta, GA 30910-2599

Dear Mr. Long:

This is response to your letter concerning the status of a letter written by Thomas P. Vartanian, former General Counsel of the Federal Home Loan Bank Board, interpreting 12 C.F.R. § 590.4(h).

The letter in question, dated October 28, 1982, which contained an interpretation of § 590.4(h) (12 C.F.R. § 590.4(h) (1982)), was an opinion of the General Counsel issued pursuant to his authority as the Chief Legal Officer of the Board. See 12 C.F.R. 500.17. The Board has not issued a specific delegation of authority to the General Counsel to issue interpretations with regard to § 501(f) of the Depository Institutions Deregulation and Monetary Control Act of 1980, Public Law 96-221.

Please let me know if I may be of further assistance.

Sincerely,

/s/ Wendy B. Samuel

Wendy B. Samuel
Deputy Director
Policy & Projects Division

APPENDIX J

FEDERAL HOME LOAN BANK BOARD — MEMO — Office of General Counsel Inter-Office Communication

From: Steven A. Rosenberg (/s/ SAR) Date: March 12, 1984

To: Denise Field, James Lantelme Subject: Usury Preemption under DIDMCA § 501

This morning Ilsa Bush and I met with Rick Perry and representatives of various companies engaged in the business of making loans secured by first liens on residential manufactured homes to discuss matters relating to federal preemption of state usury limits pursuant to 12 C.F.R. § 590.4 (manufactured homes), which was promulgated by the Board pursuant to § 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980.

During the meeting, the lenders made two requests of this Office. First, they asked that the Board publish a formal interpretation, consistent with two outstanding unpublished OCC opinions, concerning (i) disclosure of pre-payment rights and (ii) disclosure of consumer's right to cure. Secondly, they asked that the Board amend § 590.4 to provide a rule along the following lines: "State usury law is preempted notwithstanding a lender's failure to comply with the disclosure requirements of this subsection; provided that the disclosures made by the lender substantially comply with the disclosure requirements."

The lenders informed us that there has been much litigation about this subject, and that your division has submitted an amicus brief in connection with ongoing litigation in the 11th Circuit Court of Appeals. Accordingly, I would appreciate your advising me about the Litigation Division's role in that litigation and other related litigation, if any.

I also would appreciate receiving your views about the two requests made by the lenders.

APPENDIX K

FEDERAL HOME LOAN BANK BOARD — MEMO — Office of General Counsel Inter-Office Communication

From: Steven A. Rosenberg Attorney (/s/ SAR)

Date: March 23, 1984

To: C. Thomas Long Deputy General Counsel

Subject: *Rick Perry Meeting* Usury Preemption—Mobile Home Lending

This concerns our proposed meeting with attorney Rick Perry that is scheduled to be conducted on Wednesday, April 4, 1984, concerning federal preemption of state usury law with respect to mobile home financing, as provided pursuant to section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1735f-7 note (1982), and the Board's regulations promulgated thereunder, 12 C.F.R. Part 590 (1983).

As indicated in my memorandum of March 12, 1984, Ilsa Bush and I met with Rick Perry and representatives of companies engaged in the business of financing consumer purchases of mobile homes. Please find attached a copy of the aforementioned memorandum that explains that the creditors are defendants in litigation wherein the plaintiffs have asserted that the creditors are not entitled to the benefits of the federal usury preemption law, because the creditors have failed to satisfy the conditions to the use of the "safe harbor," *i.e.*, the consumer protection disclosure requirements. The Board has filed an amicus brief in those cases.

Today, I telephoned Rick and asked him why he asked for another meeting (and why he bypassed Ilsa and me). He informed me that the 11th Circuit ruled against the creditors, and would like to get the Board to intervene in the litigation for the purposes of filing a petition for certiorari with the United States Supreme Court. I asked him to provide me with a copy of the decisions and he has done so.

APPENDIX L

FEDERAL HOME LOAN BANK BOARD — MEMO — Office of General Counsel Inter-Office Communication

From: Steven A. Rosenberg (/s/ SAR) Date: March 28, 1984

To: Ilsa K. Bush Subject: *USURY PREEMPTION* Mobile Home Matter —Citicorp, et al

Yesterday, Tom Long, Jim Lantelme, and I met with attorneys Rick Perry and Aaron Peck and representatives of Citicorp, GE Credit, and Barclays, hereafter collectively referred to as the "Lenders." The meeting concerned the recent decisions of the 11th Circuit Court of Appeals regarding federal preemption of state usury laws with respect to mobile home financing. In those decisions the court agreed with the position asserted by the Bank Board that 12 C.F.R. § 590.4 does not require a lender to disclose the borrower's "right to cure" in the promissory note. The court found that, notwithstanding the lender's technical compliance with the Bank Board's regulations, the lender was not entitled to the preemption "safe harbor," because the court found that a clause in the lender's promissory note conflicts with the spirit of the consumer protection provisions of § 501 of DIDMCA and the regulations promulgated thereunder. The Lenders have requested this Agency to file an *amicus* brief in conjunction with the Lender's petition for reconsideration *en banc*.

Tom informed the Lenders that we would consider the request on the condition that they first provide us with a written request setting forth the reasons why we should continue to participate in the litigation.

APPENDIX M

April 2, 1984

C. Thomas Long
Deputy General Counsel
Federal Home Loan Bank Board
1700 "G" Street, N.W.
Washington, DC 20552

Re: Arthur Quiller, et ux., et al. vs. Barclays-American/Credit, Inc., 11th Cir. No. 83-8455, and

Jack Grant, et ux., et al. vs. General Electric Credit Corporation, 11th Cir. No. 83-8456

Dear Mr. Long:

BarclaysAmerican/Financial, Inc., successor to Barclays-American/Credit, Inc. ("Barclays") and General Electric Credit Corporation ("GECC") request the Federal Home Loan Bank Board ("the Bank Board") to prepare and file as *amicus curiae* a memorandum in support of their petitions for rehearing and suggestions for rehearing en banc in the above-referenced appeals. Decisions have been rendered in these appeals which are manifestly erroneous and, if allowed to stand, will have grave and potentially disastrous consequences for the manufactured housing industry, institutions which have provided financing for manufactured housing, the Federal Deposit Insurance Corporation ("the FDIC") and Federal Savings and Loan Insurance Corporation ("FSLIC"), and the public at large.

1. The Bank Board Has An Interest In Promoting Financial Stability In The Financial Community In General And The FSLIC In Particular.

There has rarely been a judicial decision which has the potential to wreak financial havoc of the order of magnitude of that which will be wrought by the *Quiller* and *Grant* cases.

Approximately twenty *billion* dollars of manufactured housing credit has been extended since the enactment of § 501 of DIDMCA. Approximately eight *billion* dollars has been extended in reliance on federal preemption of state usury laws. If the majority opinions in *Grant* and *Quiller* establish the law, a great many of the § 501 credit secured by manufactured housing could be subject to the debtor's attack that the contract is usurious under the particular state's law. The effect of the decisions is to place at risk up to eight billion dollars of credit extended.[1] Approximately 50% of this credit is held by institutions (or subsidiaries or affiliates of institutions) which are insured by the FDIC and another 25%, or two billion dollars, is held by institutions insured by the FSLIC.[2]

The estimated regulatory net worth of FSLIC institutions heavily engaged in the extension of § 501 manufactured housing credit may range between two and ten billion dollars.[3] Thus, if approximately two billion dollars in manufactured housing credit is held by those institutions, application of the penalties called for by state usury laws could be catastrophic and undermine the viability of a number of FSLIC insured institutions. It should be noted that even in the Truth-in-Lending area there were statutory limitations on the creditor's liability. Here, there are no such limitations or safeguards for the lending institution.

2. The Bank Board Has An Interest In Promoting The Legislative Purpose of § 501

The threat of huge and crippling losses that these decisions present will, in and of itself, reduce the availability of credit.

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[1]Total credit extended is based upon the Monthly Survey of the Federal Reserve Board. Industry experience is that federal preemption accounts for 40% of total credit extended since 1980.

[2]Publication G-19, the Federal Reserve Statistical Released dated March, 1984.

[3]The estimate is based upon the fact that according to the Semi Annual Report of the Home Loan Bank Board dated June 30, 1983, approximately 32% of all associations hold loans secured by liens on manufactured housing.

Additionally, the doubt that the decisions engender among lenders as to whether *any* credit agreement may withstand judicial scrutiny compels a re-examination of a willingness to continue to finance manufactured housing. It is likely that many institutions will simply withdraw from § 501 financing rather than assume the tremendous risks involved. This is directly contrary to and frustrates the purpose underlying § 501 which was to *increase* the availability of housing credit and to permit that credit to be more uniformly available throughout the nation without regard to state usury laws. As Judge Roney observed in his dissent, this was "a carefully conceived financing program established to meet the needs of both parties in a time of rising cost of money." Since 80% of all homes sold for under $50,000 are manufactured homes, first time homebuyers and low to middle income families are especially affected by the chilling effect that these decisions will have on the availability of credit.

3. The Bank Board Has An Interest In Promoting Administrative Economy.

Should the decisions stand, further litigation against § 501 lenders, including FSLIC insured institutions, is inevitable. In order to ensure that affordable housing continues to be available to people of limited means and to protect the fiscal integrity of the FSLIC, the Bank Board would be forced into a situation comparable to that experienced by the Federal Reserve Board under Truth in Lending. In the early 1970's, unrealistic and hypertechnical court decisions, which went far beyond the views of the agency charged with implementing the statute and regulations, strained common sense to award recoveries to debtors under the guise of promoting consumer interests. These decisions overwhelmed the FRB staff in responding to a flood of creditor demands for assistance in the form of staff opinion letters and interpretations. An inescapable result of the *Quiller* and *Grant* decisions will be an avalanche of requests to the Bank Board for guidance from creditors attempting to obtain assurance that their documentation meets the requirements of § 501. In addition, the Bank Board

may expect to be embroiled in numerous legal proceedings throughout the United States, with the substantial burden that such involvement would entail. The Truth in Lending experience acts as an object historical lesson.

4. The Bank Board Has An Interest In Avoiding Erroneous Judicial Interpretations Or Applications Of Its Own Regulations.

The *Quiller* and *Grant* decisions set a dangerous precedent in that, in violation of the clear mandate of the U.S. Supreme Court in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 554 (1980) the court fails to give "dispositive" effect to a rational interpretation by the Bank Board *of its own regulation.*[4]

As pointed out by the Bank Board in its *amicus* brief (adopting a General Counsel opinion letter):

> "the requirements of section 590.4(h) only refer to the *act* of giving notice . . . In light of the enormous potential liabilities that would result from loss of the federal usury preemption, the Board believes that the only requirements that a lender under section 590.4(h) must reasonably be expected to be aware of and follow are those explicitly set forth in the regulation or the Act."

The Bank Board requested *affirmance* of the District Court decision for the reasons stated in its brief. But the Court of Appeals decided that even if the contracts met the disclosure requirements of the regulations, the actual practices of cred-

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[4]In Milhollin the Supreme Court held:

> Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive. . .
>
> * * *
>
> Thus, while not abdicating their ultimate judicial responsibility to determine the law [citations omitted], judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational. 44 U.S. at 565, 568.

itors were consistent with the regulations and the alleged ambiguities concerned areas where no disclosure was required, federal preemption was not available. The Court condeded [sic] that no contractual provision for disclosure of the right to a 30 day cure notice is required and that creditors can use contracts that do not expressly grant the debtor a right to the 30 day notice. This is certainly correct and in this regard the panel *ostensibly* adopts the Bank Board position as stated in its *amicus* brief. But the Court, while paying lip service to the Bank Board, engages in exactly the kind of "interstitial law-making" prohibited by *Milhollin* when it holds that, although no mention of the 30 day notice need be made in the contract, if there is any such mention, that mention must meet certain vague standards of completeness, clarity and accuracy. These standards are apparently to be developed in the crucible of high stakes litigation. It is completely unrealistic for the Court to suggest that creditors can avoid any possible misunderstandings by omitting contractual recitals about creditor remedies following default. Since certain creditor remedies do not exist unless provided for in the contract (e.g., acceleration) and since state laws frequently require contractual recitals of the rights and remedies of the parties, *creditors* must deal with these topics in their contracts. The Bank Board understood this, the Court apparently did not.

The Court of Appeals erred in other respects as well. For example, the Court was totally incorrect in holding that the right to notice is *absolute* when such right is clearly qualified under both § 501 and the regulations. Summaries of points to be raised by Barclays and GECC on rehearing are attached as exhibits.

5. The Bank Board Has An Interest In Encouraging Confidence In And Reliance Upon Its Regulations.

This is a case of first impression construing a statute and regulation which are of nationwide importance. The holding in these two cases that, in deciding whether contract terms comply with the Bank Board regulations, "we should examine the

contract through the eyes of the typical consumer" imposes an impossible burden on any creditor attempting to take advantage of § 501. The Court further holds that notwithstanding the absence of any requirement to include in the original contract any reference to a 30 day notice of right to cure, the contract may nonetheless be scrutinized for provisions which may be vague or potentially contradictory as to that requirement if the Court finds any such issues. These standards of contract interpretation have created a potential lawsuit on every manufactured home contract entered into in reliance on federal preemption since 1980 and put every future contract in jeopardy.

The fatal and pervasive flaw in the *Quiller* and *Grant* opinions is the vague standards of contractual interpretation expressed in these cases, under which no creditor can be assured of federal preemption of state rate limitations under § 501 regardless of satisfying regulatory requirements in practice. In the real world, under these standards of contractual interpretation, no one can ever be certain whether a contractual recital dealing with a creditor remedy might not be interpreted as an inaccurate statement of the creditor's power which disqualifies the contract from federal preemption. As Judge Roney points out in his dissenting opinion, the equitable remedy to be applied is not the denial of federal preemption, but rather to simply invalidate any conflicting clause and enjoin enforcement of it.

By measuring compliance solely on the necessity of eliminating every possible misunderstanding on the part of consumers in complete disregard of whether creditor practices satisfy the Regulations, these decisions — unless modified — will dramatically impair federal preemption under § 501(c) of DIDMCA.

For all of the above reasons, Barclays and GECC respectfully request that the Bank Board support their petitions for rehearing and suggestions for rehearing en banc by filing a motion asking for leave to file a memorandum of points and authorities, accompanied by such memorandum on or before April 9, 1984.

BarclaysAmerican/Financial, Inc., Successor to BarclaysAmerican/ Credit, Inc.

By: /s/ William B. Webb, Jr.
William B. Webb, Jr., Counsel

General Electric Credit Corporation

By: /s/ Brock J. Austin
Brock J. Austin, Counsel

GENERAL ELECTRIC CREDIT CORPORATION SUMMARY OF PROBABLE ARGUMENT ON REHEARING

I.

Whether the panel decisions' erroneous construction of a single term in the contract inequitably and unjustly results in a forfeiture by the creditor of millions of dollars in Georgia alone.

A. The panel misapplied the Federal Preemption Act and the basic rules of contract construction, producing potential industry-wide liability in millions of dollars.

B. The panel erroneously construed the default and acceleration language in the contract as not requiring notice to cure before acceleration of the debt.

C. If the clauses of the provision are ambiguous or conflicting as the panel holds, then such clauses should be reconciled to give effect to the existing law and the intent of the parties.

II.

Whether the panel decision holding that a debtor has absolute right to notice of right to cure a default is contrary to the Act and Regulations.

A. The panel's holding that the default and acceleration provision and the right of notice of cure default provision are conflicting provisions is based on the premise that the debtor has an *absolute* right to a notice of right to cure a default. This holding is incorrect and inconsistent with the Act and Regulations which clearly show that the notice is a qualified, not absolute right. If the right is not absolute, then the premise underlining the supposed conflict no longer exists.

B. The panel's decision admits that the entire notice provision is not required to be in the contract. Therefore, it follows that the notice requirement is a *course of conduct* requirement. There is no allegation that GECC exercised its right to accelerate before giving the required thirty-day notice.

III.

Whether the panel decision ignores controlling principles of contractual interpretations.

A. The panel's decision ignores controiling principles of contractual interpretation. The panel erroneously construed the contractual provision to be contrary to the law. Under any interpretation, the provision is just as susceptible to being fully consistent with the existing law as to be in conflict with the law.

B. The panel erroneously holds that the parties were not presumed to know the existing law.

C. The panel ignored the severability clause in the contract which would have given the intent of the contracting parties and saved the contract from nullifying the Federal preemption.

IV.

Whether the panel decision is contrary to the national housing policy and the public policy of the State of Georgia.

A. The panel's construction of the contract language is inconsistent with the national housing policy in that it would stifle the flow of mortgage money into the housing market. Potential investors will not advance millions of dollars to provide mortgage financing on documents which would be subject to the vague standard of "potential ambiguity" set forth in the panel's decision.

B. The panel opinion is contrary to public policy of the State of Georgia. In 1983, the Georgia Legislature passed House Bill 128 which eliminated all limits on finance charges to which parties agree in writing on any manufactured home where the cash price is above $3,000. This Act also limits the maximum liability for violations to $1,000 and precludes the filing of class actions to enforce the Georgia Act. The Grant complaint was filed four days before this Act became law.

C. The GECC contract was reviewed by the FHLBB in connection with a prior request for ruling on whether the 30-

day notice provision was required to be in the contract. The same language of this provision of the contract was reviewed by the FHLBB without a finding that the provisions were confusing or conflicting. The opinion letter of the General Counsel was cited with approval by this panel in *Quiller*. A creditor should be able to rely upon this action by the governmental regulatory authority in complying with the law.

V.

Whether the panel's decision embodies a totally unjust and inequitable remedy which is inconsistent with the national and state public policy.

A. The holding of the panel would preclude a creditor from showing that its course of conduct was clearly consistent with both the Act and the Regulations. GECC has filed a request for the Court to receive an affidavit so that the Court can understand that the present ruling of the panel would produce an unjust result based on the course of conduct of the creditor.

B. The remedy allowed by the panel's opinion is draconian and contrary to other controlling rules of contractual interpretation. If the contract provision is deemed to be ambiguous or even conflicting by the Court, then the provision itself should be considered unenforceable, but the contract not declared illegal or the preemption nullified.

C. If the Court deems the provision of the contract to suggest that the creditor may accelerate payments upon default without giving notice, then the Court can construct a remedy to enjoin the creditor from accelerating without the 30-day notice. An evidentiary hearing would clearly show that GECC complied with the Act and Regulations in every respect.

QUILLER: POINTS TO BE ARGUED IN PETITION FOR REHEARING

I. The Court's Decision Fails To Follow The Mandate Of The United States Supreme Court As Pronounced In *Ford Motor Credit Corporation v. Milhollin*, 444 U.S. 554, 100 S.Ct. 790 (1980).

A. § 590.4(h) only imposes requirements as to the actual giving of the 30-day notice.

B. The FHLBB, in its amicus curiae brief in this case, has interpreted its own regulation as regulating only "the act of giving notice," not the contents of the original contract as they relate to the 30-day notice requirement.

C. The FHLBB's interpretation of its own regulation is not "demonstrably irrational."

D. Therefore, under Milhollin, the FHLBB's interpretation should be "dispositive" of the case, and the trial court's decision should be affirmed.

II. This Case Is Especially Appropriate For *En Banc* Consideration.

A. The potential damages in Quiller, Grant and Moyer combined involve multi-millions of dollars.

B. The decision would have even greater financial repercussions as the regulation is effective nationwide and the effect of the court's decision is to subject each mobile home contract to scrutiny on a case by case basis for compliance with the court's "interstitial" requirement of accurate disclosure in the contract of the details of the buyer's right to receive the 30-day notice.

C. The decision fails to follow Milhollin.

D. The case involves a case of first impression construing a federal regulation of nationwide applicability.

E. The decision was not unanimous, and Judge Roney's dissent posited an alternate remedy which would give effect to the actual requirements of the regulation, without playing havoc among the creditors.

III. Purely As A Matter Of Contract Construction, The Quiller Contract Did In Fact Condition Its Right To Accelerate Or Repossess Upon The Giving Of The Section 590.4(h) Notice Of Right To Cure.

A. The Quiller contract specifically conditions the right to accelerate or repossess as being "subject to any notice of right to cure." Under familiar rules of contract construction, that provision would be construed to be

1. legal as opposed to illegal;
2. enforceable as opposed to unenforceable; and
3. would be construed most strongly against the drafter;
4. and therefore would be given the broadest possible effect for the protection of the nondrafting party.

B. Therefore, in any lawsuit based upon the contract itself, a court would find that the provision "subject to any notice of right to cure" entitled the debtor to the section 590.4(h) notice.

C. The court was thus incorrect in concluding that the contractual provision actually was in conflict with the requirements of the regulation.

IV. As A Matter Of Law, Even If The Proviso "Without Notice, Subject To Any Notice Of The Right To Cure" Be Construed To Allow Action Violative Of Section 590.4(h), The Mere Presence In The Contract Of That Provision Does Not In And Of Itself Violate The Regulation.

A. In accordance with the clear wording of § 590.4(h), the interpretation of that wording by the FHLBB's general counsel in his October 28, 1982, letter, and the FHLBB's adoption of that letter at page 8 of its amicus curiae on file in this case, the right to the 30-day notice did not have to be provided for in the contract between the parties, nor did that right have to be disclosed in the original contract.

B. As interpreted by the FHLBB, § 590.4(h)(1) regulates only "the act of giving notice." FHLBB amicus brief, p. 7.

C. A provision in a contract which, if enforced in accordance with its terms, would result in the violation of a federal statute, does not void the entire contract — the only sanction is that the provision itself is unenforceable and, if the provision is in fact enforced, the offending party is subject to whatever sanctions are imposed for taking such action. *Stewart v. Ford Motor Credit Company*, 685 F.2d 391, *reh. den* 694 F.2d 727 (11th Cir. 1982); *Vineberg v. Brunswick Corporation*, 391 F.2d 184 (5th Cir. 1968); *Seaboard Surety Company v. Harbison et al.*, 304 F.2d 247 (7th Cir. 1962); *Ets-Hokin & Galvan, Inc. v. Maas Transport, Inc. et al.*, 380 F.2d 258 (8th Cir. 1967). *See, Bell v. Loosier of Albany, Inc.*, 237 Ga. 585, 229 S.E.2d 374 (1976); *Porter et al v. Midland-Guardian Company*, 145 Ga. App. 262, 243 S.E.2d 595 (1978), *rev'd on other grounds*, 242 Ga. 1, 247 S.E.2d 743 (1978); *Lowe v. Termplan, Inc.*, 144 Ga. App. 671, 242 S.E.2d 268 (1978).

V. The Quillers' Complaint Was Filed Beyond The Applicable One Year Statute Of Limitations, As Clearly Appears On The Face Of The Complaint In THIS CASE.

A. The complaint was filed more than one year after the contract was executed.

B. As the Federal Preemption Act contains no statute of limitations, federal law requires that the court look to the most closely analogous state statute of limitations. *Johnson v. Railway Express Agency Inc.* 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975).

C. The most closely analogous state statute of limitations would be that contained in Georgia's usury statute, Ga. Code Ann. § 57-115, which prescribes a one year statute of limitations.

D. As this is a suit to enforce a penalty, the one year statute of limitations found in Ga. Code Ann. § 3-714 would also bar the Quillers' suit.

APPENDIX N

NOTE

_____, 19__ _____, _____
(City) (State)

Property Address)

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $_____ (this amount is called "principal"), plus interest, to the order of the Lender. The Lender is _____ _____ I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

. . .

3. PAYMENTS

. . .

4. BORROWER'S RIGHT TO REPAY

. . .

5. LOAN CHARGES

. . .

MULTISTATE FIXED RATE NOTE—Single Family—
FNMA/FHLMC UNIFORM INSTRUMENT
Form 3200 12/83

6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of _____ calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be _____% of my

overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is delivered or mailed to me.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

7. GIVING OF NOTICES

. . .

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

. . .

9. WAIVERS

. . .

10. UNIFORM SECURED NOTE

This note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

> Transfer of the Property or a Beneficial Interest in Borrower. If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED

_____ (Seal)
Borrower

_____ (Seal)
Borrower

_____ (Seal)
Borrower

[Sign Original Only]

Supreme Court, U.S.
FILED
NOV 29 1985
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 85-541

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC.,
Petitioner,

v.

ARTHUR QUILLER, LILLIE MAE QUILLER, and
All Other Persons Similarly Situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC.,
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v.

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All Other Persons Similarly Situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BarclaysAmerican/Credit, Inc. [hereinafter "BarclaysAmerican"], the Petitioner herein, respectfully prays that this Court reject the arguments presented by the Quillers in their Brief In Opposition To Petition For Writ Of Certiorari and that a Writ Of Certiorari issue to review the July 8, 1985, *en banc* judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

I. Introduction

In this reply, BarclaysAmerican will address three arguments raised by the Quillers which were not *per se* addressed in BarclaysAmerican's Petition For Writ Of Certiorari.

II. The Views Of The Federal Home Loan Bank Board And Its General Counsel Are Entitled To Great Deference.

A major thrust of the Quillers' Brief In Opposition is their attempt to diminish the authority of the opinion letter issued by the Federal Home Loan Bank Board's [hereinafter "FHLBB" or the "Board"] General Counsel, Thomas P. Vartanian, on October 28, 1982, 5 Fed. Banking L. Rep. (CCH) ¶83,027 (1983) [hereinafter "the Vartanian Letter"] (Appendix J[1]). They seek to do this in three ways: first, by making a vicious and unprecedented attack upon the office of the General Counsel of the FHLBB, alleging that the General Counsel's office "has not been an impartial agency issuing interpretations of its regulations, but has been an advocate of certain mobile home finance companies, issuing *post hoc* rationalizations," Brief In Opposition To Petition For Writ Of Certiorari, p. 7, n. 3; secondly, by characterizing the Vartanian Letter as an "unofficial opinion" which, they argue, because of its "unofficial status" is not entitled to any deference by this Court; and, finally, by referring to the Vartanian Letter as a "*post hoc* rationalization" of the meaning of the regulation. The first of those contentions is scarcely worthy of comment, except perhaps the observation that the First Amendment to the Constitution guarantees all citizens the right to go to the government and express views and make requests of the government, and there is nothing improper in that. U.S. Const. amend. I. Furthermore, it is presumed that government agencies act with propriety, including, as in this instance, expressing *honest* opinions when opinions are expressed. Certainly nothing in the record of this case gives any indication to the contrary with regard to the Vartanian Letter. The other two contentions are discussed *seriatim* below.

---

1. The Appendix to the Petition For Writ Of Certiorari was filed as a separate document. Citations to portions of a particular appendix will be as follows: "App. ___ at ___."

The Quillers point out that there was no specific delegation of authority from the FHLBB to the General Counsel to issue "interpretations" pursuant to § 501(f) of DIDMCA. However, 12 C.F.R. § 500.17 describes the authority of the FHLBB's General Counsel as follows:

> The General Counsel is the chief legal officer of the Board and has, among other functions, those set forth below. He is responsible for the representation of the Board and the Federal Savings And Loan Insurance Corporation in judicial proceedings in which the Board or the Corporation is involved as a party or as amicus curiae. . . . *He is responsible for advising the Board with respect to interpretations involving questions of law*, for the preparation of legislation submitted by the Board to Congress, for the preparation of Board comments to Congress upon pending legislation, *and for the preparation of regulations*. . . .
>
> (Emphasis added).

The General Counsel possesses broad authority under the FHLBB regulations, particularly in legal matters. The construction of the language of a regulation promulgated by the FHLBB is peculiarly within the ambit of the General Counsel's authority, especially in view of the General Counsel's participation in the drafting of regulations.

The Quillers attempt to distinguish *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980) [hereinafter "*Milhollin*"], from the case *sub judice* on the basis that "Congress conferred special status upon official staff interpretations" of the Federal Reserve Board [hereinafter "FRB"] under the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* Brief In Opposition To Petition For Writ Of Certiorari, p. 16. In *Milhollin*, this Court held "that the Court of Appeals erred in rejecting the views of the Federal Reserve Board and staff," 444 U.S. at 570, as expressed in an Official Staff Interpretation and three unofficial Public Information Letters, stating that "[u]nless demonstrably irrational, Federal

Reserve Board staff opinions construing the act or regulations should be dispositive. . . ." 444 U.S. at 565.

It is important to note that, in *Milhollin*, the levels of the FRB's interpretative authority (*e.g.*, "official," "unofficial," etc.) designated by 15 U.S.C. § 1640(f) were not dispositive of the issue in that case. 444 U.S. at 566, n.9. Rather, the issue in *Milhollin*, as in this case, was whether the lower court, in deciding what Regulation Z actually meant, had failed to give appropriate deference to the FRB's interpretation of its own regulations. As the discussion below will demonstrate, in a non-reliance case, an agency's own interpretation of the statute it administers and the regulations promulgated thereunder are entitled to great deference in guiding judicial construction, regardless of the source of the interpretation within the agency.

The rule that agency interpretations are entitled to "great deference" by the courts has been applied to opinions of the General Counsel of the FHLBB. In *Michaels v. Federal Savings and Loan Insurance Corp.*, 413 F.2d 144 (7th Cir. 1979), the issue was whether the triggering date for determining who is an insured under FSLIC insurance was the date a defaulting savings and loan association was taken into custody by state officials, as the plaintiff contended, or the date default was formally declared, as the FSLIC contended. Plaintiff's husband died between the two dates, and she became sole owner of the couple's joint and separate accounts. The court held that Mrs. Michaels could recover the insurance only for herself, but not for her husband, because the identity of the insureds is determined as of the date of default, 413 F.2d at 146, explaining that this

> interpretation is in conformity with that of the defendant agency, which is charged with the administration of the National Housing Act. . . . The position that the default date determines the status of an insured account was taken by the FSLIC as early as March, 1937, see 3 Fed. Home Loan Bank Review 187 (1936-1937), and has been repeated in later opinions of the General Counsel of the Federal Home Loan Bank Board (the

> operating head of the defendant). The uniformity of this position, along with the lack of judicial interpretation of the relevant sections of the Act, is entitled to "great deference" in our statutory interpretation. See *Udall v. Tallman*, 380 U.S. 1, 16 . . . (1965).
>
> 413 F.2d at 147 (footnote omitted).

The *Michaels* court recognized, without discussion, the authority of the FHLBB's General Counsel to issue opinions with regard to matters under the auspices of the FHLBB.

It is significant that the *Michaels* court relied on the leading case of *Udall v. Tallman* as authority for the deference rule. In *Udall*, this Court stated:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. . . . *When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.*
>
> 380 U.S. at 16 (emphasis added).

This same passage from *Udall* was relied upon by this Court in *Milhollin*, 444 U.S. at 566. Thus, the rule of deference in cases like this is dependent, not upon whether the particular interpretation is the product of a specific grant of authority, but upon the recognition of an agency's expertise which follows from its general authority to administer a specific act and promulgate regulations. Therefore, under *Udall*, the deference rule should be given much broader application than that urged by the Quillers.

Moreover, even under the TILA, which was at issue in *Milhollin*, there is nothing which precludes a court from considering even an advisory opinion of the Federal Reserve Board. For example, in *Gerlach v. Allstate Insurance Co.*, 338 F. Supp. 642 (S.D. Fla. 1972), the plaintiff asserted that the TILA applied to premium payment plans under an insurance policy. The district court dismissed the plaintiff's

complaint, noting that the issue was one of first impression. The court relied on certain "correspondence releases by the Federal Reserve Board. . . published in the CCH Consumer Credit Guide" in distinguishing the premium plan of Allstate from a premium financing situation, noting that the correspondence releases were persuasive, although not binding, authority. 338 F. Supp. at 648.

In summary, even though the Vartanian Letter standing alone may not be equivalent to an "interpretation" of the Board, it would be entitled to deference in view of the FHLBB General Counsel's responsibilities vis-a-vis the Board's regulations. Furthermore, the fact that Mr. Vartanian's views have been adopted by the Board itself clearly makes those views entitled to the "great deference" to be accorded under *Udall.*

The Quillers next argue that the Vartanian Letter is merely a "*post hoc* rationalization," placing great emphasis upon the timing of the Vartanian Letter; however, the sequence of events in this suit arguably enhances, rather than diminishes, the authoritativeness of the Vartanian Letter. The DIDMCA regulations went into effect on July 30, 1980, and the Quiller contract was entered into on June 27, 1981, the Vartanian Letter followed on October 28, 1982, and the Quillers filed suit on March 2, 1983, approximately four months later. Accordingly, the Quillers cannot contend that the Vartanian Letter was the product of political machinations on the part of BarclaysAmerican.

Moreover, this Court has held that the political origins and policy disputes surrounding the promulgation of regulations and agency interpretations are not proper areas of inquiry by the judiciary. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. ___, 104 S. Ct. 2778 (1984). The issue in that case was whether the Environmental Protection Agency's regulatory definition of the statutory term "stationary source" was a reasonable construction. 104 S.Ct. at 2780. This Court held that the Agency's definition of "stationary source" should have been followed by the Court of Appeals. In addition, this Court

found that an agency's interpretation should not be discredited by the fact that the agency may have been influenced by public policy disputes and considerations, stating:

> The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the bubble concept, but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.
>
> * * *
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

104 S. Ct. at 2793 (footnote omitted)(citation omitted).

Accordingly, the arguments raised by the Quillers concerning the political genesis of the Vartanian Letter and the FHLBB *amicus* briefs should be disregarded by this Court.

III. Neither The Vartanian Letter Nor The FHLBB Amicus Curiae Briefs Represent "Post Hoc Rationalizations" By The FHLBB Of Its Position With Regard To 12 C.F.R. § 590.4(h), The FHLBB *Amicus Curiae* Briefs Simply Adopt The Position Of The General Counsel Stated In The Vartanian Letter.

The Quillers attack the FHLBB's *amicus curiae* briefs as "*post hoc* rationalizations. . . obtained *ex parte* in connec-

tion with pending litigation [which] are inconsistent with [DIDMCA]." Brief In Opposition To Petition For Writ Of Certiorari, p. 15-16. However, the two cases cited by the Quillers as establishing grounds for such criticism are completely inapposite to the case *sub judice*. In *Bread Political Action Committee v. Federal Election Committee*, 455 U.S. 577 (1982), this Court had under consideration the construction of 2 U.S.C. § 437h(a), which controlled standing to sue under the Federal Election Campaign Act [hereinafter "FECA"]. The parties seeking to assert a claim under the FECA submitted the post-litigation affidavit of Senator James Buckley, who had prepared the original draft of the statute, in an effort to substantiate their interpretation of the scant legislative history of the FECA concerning standing. This Court stated that it could not

> give probative weight to the affidavit because "[s]uch statements 'represent only the personal views of th[is] legislato[r], since the statements were [made] after passage of the Act,' . . . "*[p]ost hoc* observations by a single member of Congress carry little if any weight."
>
> 455 U.S. at 582, n. 3 (citations omitted).

In contrast to this case, the *Bread Political Action Committee* case did not involve a regulation or an interpretation by the Federal Election Commission or any other agency, but involved an interpretation of the statute itself. The parties seeking standing in the *Bread Political Action Committee* case submitted the affidavit of Senator Buckley for the purpose of *clarifying and explaining* an act of Congress. That is totally different from an agency opinion issued in accordance with a regulatory scheme established by a statute which actually contemplates an ongoing interpretative process by the agency. In this case, the Vartanian Letter was issued by the General Counsel of the agency charged by Congress with administering DIDMCA and promulgating regulations thereunder. The FHLBB's *amicus curiae* briefs simply *adopt* the views expressed in the Var-

tanian Letter, which is directly on point to the issue in this case.

The second case cited in support of the Quillers' *post hoc* rationalization argument, *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980) is also inapposite to this case. In the *GTE Sylvania, Inc.* case, this Court was again presented with a question of statutory (not regulatory) construction. Pursuant to a Freedom Of Information Act [hereinafter "FOIA"] request, the Consumer Product Safety Commission [hereinafter "CPSC"] released certain information concerning various accident reports, some of which were labelled confidential by the manufacturers, without first following the procedures under the Consumer Product Safety Act [hereinafter "CPSA"] of notification to the relevant manufacturers. This Court found that the CPSA and the FOIA, read together, required that the CPSA notification procedures must be followed prior to release of information pursuant to a FOIA request. In so holding, this Court rejected a CPSC administrative interpretation of the CPSA issued *after* the CPSC had released the information involved in that case and *after* the manufacturers had filed their actions. This Court also rejected legislative commentary made after the passage of the CPSA. Again, the courts apply a different rule where the question involves construction of an act of Congress, as in the *G.T.E. Sylvania, Inc.* case, than where the construction of an agency's own regulation is at issue, as in this case.

IV. A Statutorily Required Action, Such As The Giving Of A 30-day Notice By The Creditor Prior To Foreclosure, Does Not Have To Be Expressly Contained In The Sales Contract In Order For The Debtor To Acquire An Enforceable Right To Receive The 30-Day Notice.

The Quillers, in perhaps their most startling statement in this litigation to date, again argue, as they did in their Cross-Petition For Writ Of Certiorari, that, under general

maxims of contract construction, the absence from a contract of a provision specifying that the 30-day notice required by 12 C.F.R. § 590.4(h) be given would result in the debtor's having no enforceable right to the notice because only express requirements of the contract are enforceable. This argument, if adopted by this Court, would represent a radical departure from traditional American jurisprudence on this subject, and is dealt with by BarclaysAmerican in its Brief In Response To Cross-Petition For Writ of Certiorari at Section II, and BarclaysAmerican simply incorporates that discussion herein.

V. Conclusion

In conclusion, BarclaysAmerican respectfully prays that this Court grant its Petition For Writ Of Certiorari.

Respectfully submitted,

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Dated: November 27, 1985

MOTION FILED
OCT 25 1985

No. 85-541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC.,
Petitioner

v.

ARTHUR QUILLER, LILLIE MAE QUILLER, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE CONSUMER BANKERS ASSOCIATION, AND THE NATIONAL COUNCIL OF SAVINGS INSTITUTIONS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE, AND BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITIONER'S POSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

MOTION OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE CONSUMER BANKERS ASSOCIATION, AND THE NATIONAL COUNCIL OF SAVINGS INSTITUTIONS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The American Financial Services Association (AFSA), the Consumer Bankers Association (CBA), and the National Council of Savings Institutions (the Council) re-

spectfully move, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as *amici curiae* in support of Petitioner's position. The Petitioner has consented to the filing of such brief. The Respondents denied consent to file *amicus curiae* briefs to both AFSA and CBA before the Eleventh Circuit. AFSA and CBA were granted permission to file before the Eleventh Circuit.

The AFSA is the nation's trade association serving consumer finance companies. Organized in 1916, AFSA represents over 550 companies engaged in the extension of consumer credit throughout the United States.

AFSA member companies are vitally interested in this case as they hold over $9.4 billion in manufactured housing loans as of July 1985,[1] much of which is financed under the regulatory framework, the validity of which is at issue in this case.

CBA is a nonprofit organization that was organized in 1919 to provide a voice for the retail banking industry. Today, membership in CBA is open to any federally insured depository institution, including commercial banks, thrifts and credit unions. Combined, CBA members now hold over 70% of all consumer credit outstanding held by commercial banks and over 80% of the consumer credit accounts held by commercial banks.

Federally insured depository institutions are vitally interested in the outcome of this case as they hold more than $15 billion in manufactured housing loans as of April 1985.[2]

The Council, formed by a consolidation of the National Savings and Loan League and the National Association

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[1] *G.19 Statistical Report,* Federal Reserve Board, September 17, 1985.

[2] *August 1985 Federal Reserve Bulletin,* p. A40.

of Mutual Savings Banks, represents over 600 savings institutions with aggregate assets of over $400 billion. Council members finance manufactured housing and operate under a general regulatory framework administered by the Federal Home Loan Bank Board, the agency whose regulation and ultimate authority are at issue in this case.

Until this litigation, the preemption provisions of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 161 (1980) codified at 12 U.S.C. § 1735f-7 (the Preemption Act) and the implementing regulations were understood by the industry and interpreted by the legal community and the Federal Home Loan Bank Board (the Bank Board) to entail a few, straight-forward contractual disclosure requirements. The court of appeals' decision is premised on a hypertechnical interpretation of the substance of the Preemption Act. Worse yet, this interpretation is itself based on an erroneous view of the congressional purpose underlying the Preemption Act. Based on this decision, thousands of transactions are at risk through their failure to withstand such scrutiny. Litigation reminiscent of that experienced under the original Truth-in-Lending Act may be anticipated, particularly in view of the extraordinary recoveries sought herein.

This decision has created substantial uncertainty in the marketplace as to the requirements of the Preemption Act, thereby discouraging prospective investment nationwide in contracts entered into pursuant to that law. The court of appeals decision jeopardizes the heretofore justified reliance of creditors on the interpretations of the Bank Board, which, in an era of form contracts made by interstate credit grantors, is essential. This decision thereby directly thwarts the congressional intent to facilitate national housing policies underlying the Preemption Act.

WHEREFORE, it is respectfully requested that the Court grant movants leave to file the attached brief as *amici curiae* in this case.

Respectfully submitted,

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October 25, 1985

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-541

BARCLAYSAMERICAN/CREDIT, INC.,
Petitioner

v.

ARTHUR QUILLER, LILLIE MAE QUILLER, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICI CURIAE OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE CONSUMER BANKERS ASSOCIATION, AND THE NATIONAL COUNCIL OF SAVINGS INSTITUTIONS IN SUPPORT OF THE PETITIONER'S POSITION

STATEMENT OF INTERESTS

The AFSA is the nation's trade association serving consumer finance companies. Organized in 1916, AFSA represents over 550 companies engaged in the extension of consumer credit throughout the United States.

AFSA member companies are vitally interested in this case as they hold over $9.4 billion in manufactured housing loans as of July 1985, much of which is financed under the regulatory framework, the validity of which is at issue in this case.

CBA is a nonprofit organization that was organized in 1919 to provide a voice for the retail banking industry. Today, membership in CBA is open to any federally in-

sured depository institution, including commercial banks, thrifts and credit unions. Combined, CBA members now hold over 70% of all consumer credit outstanding held by commercial banks and over 80% of the consumer deposit accounts held by commercial banks.

Federally insured depository institutions are vitally interested in the outcome of this case as they hold more than $15 billion in manufactured housing loans as of April 1985.

The Council, formed by a consolidation of the National Savings and Loan League and the National Association of Mutual Savings Banks, represents over 600 savings institutions with aggregate assets of over $400 billion. Council members finance manufactured housing and operate under a general regulatory framework administered by the Federal Home Loan Bank Board, the agency whose regulation and ultimate authority are at issue in this case.

Until this litigation, the preemption provisions of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 161 (1980) codified at 12 U.S.C. § 1735f-7 (the Preemption Act) and the implementing regulations were understood by the industry and interpreted by the legal community and the Federal Home Loan Bank Board (the Bank Board) to entail a few, straight-forward contractual disclosure requirements. The court of appeals' decision is premised on a hypertechnical interpretation of the substance of the Preemption Act. Worse yet, this interpretation is itself based on an erroneous view of the congressional purpose underlying the Preemption Act. Based on this decision, thousands of transactions are at risk through their failure to withstand such scrutiny. Litigation reminiscent of that experienced under the original Truth-in-Lending Act may be anticipated, particularly in view of the extraordinary recoveries sought herein.

This decision has created substantial uncertainty in the marketplace as to the requirements of the Preemption Act, thereby discouraging prospective investment nationwide in contracts entered into pursuant to that law. The court of appeals decision jeopardizes the heretofore justified reliance of creditors on the interpretations of the Bank Board, which, in an era of form contracts made by interstate credit grantors, is essential. This decision thereby directly thwarts the congressional intent to facilitate national housing policies underlying the Preemption Act.

SUMMARY OF ARGUMENT

Congress enacted the Preemption Act to assure the availability of mortgage credit for both site-built and manufactured housing in states whose usury limits were fixed in preinflationary times. Without such preemption, available mortgage funds would have continued to migrate to states with less stringent usury limits. This situation brought great hardship to the housing industry and to the consumer in search of affordable housing. Therefore, the court of appeals determination that consumer protection is a principal object of the Preemption Act and the "price" of interest rate relief, is an untenable construction of the congressional purpose and action.

Appellees have in no way been harmed. Substantial damage will entail, however, for the nation's housing policies, manufactured housing lenders and consumers seeking affordable housing as a result of the court of appeals decision.

In light of the above, amici curiae respectfully submit that the court of appeals decision directly contradicts the congressional intent behind the Preemption Act, thwarts national housing policies, jeopardizes heretofore justifiable reliance on interpretations of the Bank Board and causes unjustifiable harm to manufactured housing lenders and to consumers in search of affordable housing.

ARGUMENT

I. THE PURPOSE OF THE PREEMPTION ACT WAS TO OVERRIDE STATE INTEREST RATE LIMITATIONS ON RESIDENTIAL MORTGAGE TRANSACTIONS, NOT TO REQUIRE NEW CONSUMER PROTECTIONS

The court of appeals decided that an ambiguous reference to consumer protections—not required to be disclosed in a mortgage contract—misled the borrower and deprived the contract of federal rate relief. Essential to this determination, was the court's view that the Preemption Act is a consumer protection law designed to be strictly and technically construed. However, an analysis of the history and content of the federal law in question does not support this view. Instead, the Preemption Act was designed to afford interest rate relief to financial institutions and mortgage lenders to ease a credit crunch.

A. The Legislative History Reflects That Congress Simply Intended To Stimulate Housing Finance, Not To Create A New Consumer Protection Statute

The Preemption Act contains three parts, each dealing with a different segment of a lending market that, at the time of the law's passage, could only be described charitably as "troubled." At the time of passage, prevailing market interest rates for consumer and commercial loans approached or exceeded 20% per annum. The cost of funds in this period, as reflected by the prime lending rate and the federal discount rate, followed close behind.

Part A of the Act—described below—is the subject of this case. Part B created an alternative federal interest rate for business and agricultural loans and Part C freed federally-insured institutions from restrictive state usury laws.

Part A of the Act totally preempts state law limitations on residential mortgage loans secured by a first

lien.[1] Congress determined that the housing industry was particularly susceptible to the destabilizing effects of a market with rates at a historical high and with state law rate limitations established during the depression.[2]

As the legislative history explains:

> (W)here state usury laws require mortgage rates below market levels of interest, mortgage funds in those states will not be readily available and those funds will flow to other states where market yields are available. *This artificial disruption of funds availability not only is harmful to potential homebuyers in states with such usury laws, it also frustrates national housing policies and programs.*
>
> (T)his limited modification in state usury laws will enhance the stability and viability of our Nation's financial system and *is needed to facilitate a national housing policy and the functioning of a national secondary market in mortgage lending.* S. Rep. No. 96-368, 96th Cong., 2nd Sess. 18-19 (1979), *reprinted in* 1980 U.S. Code Cong. and Ad. News 254-55. (emphasis added)

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[1] Sec. 501, Pub. L. No. 96-221.

[2] Senator Proxmire's opening statement accompanying the Senate bill which included the eventual Preemption Act noted:

> "Usury limits have become economically counter-productive, if they ever had any purpose.
>
> Most usury limits were established during the depression and bear no reasonable relationship to today's circumstances. Borrowers are hurt, not helped, by unrealistic lending limits and also homebuilding, small business, or agricultural purposes, if they are restricted to rates below the market rate. The homebuilding industry is particularly disadvantaged by usury limits . . . the impact will be most severely felt by younger, lower-income prospective homeowners."

Usury Lending Limits: Hearing on S. 1988 before the Comm. on Banking, Housing and Urban Affairs, 96th Cong., 1st Sess. (1979).

The legislative history noted that preemption of state law limitations ultimately would have the salutory effect of permitting loan originators to offer more attractive rates of return, thereby attracting increased capital to fuel a housing recovery.

> In addition to the adverse effects of usury ceilings on credit availability, mortgage rate ceilings must be removed if savings and loan institutions are to begin to pay market rates of interest on savings deposits. *Without enhancing the ability of institutions to achieve market rates on both sides of their balance sheets, the stability and continued viability of our nation's financial system would not be assured. Thus, Federal preemption of State usury ceilings would not only promote national home financing objectives but would provide the resources with which savers could be paid more interest on their savings accounts.* (emphasis added) *Id.*

Significantly, the legislative history reflects a specific intention not to address the question of consumer protection on the federal level.

> In exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate. The Committee does not intend to exempt limitations on prepayment charges, attorney fees, late charges or similar limitations designed to protect borrowers. *Id.*

Both the statute and the legislative history of the Preemption Act clearly show that Congress was preoccupied with the need to stimulate housing credit by freeing it from the shackles of an archaic system of state rate ceilings. The court of appeals mistakenly read a consumer protection scheme into the congressional purpose and action behind passage of the Act.

Had Congress intended to make consumer protections the centerpiece of the Preemption Act it could have done

so. In fact, the Preemption Act is but one title of comprehensive legislation. The Truth-in-Lending Simplification and Reform Act (The "Simplification Act") was enacted along with the Preemption Act as Title VI of Pub. L. No. 96-221. It was specifically designed to simplify and clarify the technical disclosure requirements of the original Truth-in-Lending Act and thereby limit the volume of frivolous litigation that had erupted under the original law.[3] The passage of the Simplification Act as a separate but companion piece to the Preemption Act clearly distinguishes the congressional intent behind the respective laws and evinces a congressional goal to discourage the very type of hypertechnical litigation that is before this Court on appeal.

Unlike the Preemption Act, the Simplification Act is categorical in its avowed consumer protection purposes and detailed requirements:

> It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.[4]

The Simplification Act comprises a total of 31 statutory sections specifying in detail the disclosures that must be made at every step of a consumer credit transaction. This statutory scheme is, of course, fleshed out by Regulation Z which is comprised of 4 subparts, 29 separate sections, and a 10-part appendix.[5] In addition, the staff of the Federal Reserve Board has published its

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[3] See the *Background and Summary of Regulation Z* published by the Board of Governors of the Federal Reserve System, Paragraph 6-1125.1 of the Federal Reserve Regulatory Service, Vol. 2.

[4] Sec. 102. Pub. L. No. 90-321 (as amended).

[5] 12 CFR §§ 226.1 *et seq.*

Official Staff Commentary to Regulation Z, a 100-plus page supplement, which is updated annually.

In striking contrast to the volume and detail of this federal consumer protection law and regulation, section 501(c) of the Preemption Act—in its entirety—provides that the terms and conditions relating to a manufactured housing loan or credit sale shall comply with Bank Board regulations which are to:

> (1) Include consumer protection provisions with respect to balloon payments, prepayment penalties, late charges, and deferral fees;
>
> (2) require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances);
>
> (3) require that upon prepayment in full, the debtor shall be entitled to a refund of the unearned portion of the precomputed finance charge in an amount not less than the amount which would be calculated by the actuarial method, except that the debtor shall not be entitled to a refund which is less than $1; and
>
> (4) include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required. Sec. 501(c)(1) through-(4), Pub. L. No. 96-221.

Clearly, the statute requires neither express disclosure requirements nor specific contractual consumer protection provisions.

This Court has plainly stated there is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Association*, 310 U.S. 534, 543 (1940). Where the words of a statute are unambiguous, this Court repeatedly has required that the "plain meaning" of the statutory lan-

guage be followed. See *Potomac Electric Power Co.* v. *Director*, 449 U.S. 268, 283-84 (1980); *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 176 (1980); *Diamond* v. *Chakrabarty*, 447 U.S. 303, 315-18 (1980); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961); *McDonald* v. *Thompson*, 305 U.S. 263, 266 (1938).

The court of appeals has gone beyond the plain meaning of the statutory language to find a requirement that additional consumer protections are required. With the exception of the prepayment and notice requirements stated above, the substance of the consumer protections that are to be included in the Bank Board regulation are not described. In fact, subsections 501(c)(1) and 501(c)(4) generally defer to the judgment of the Bank Board and evidence little legislative regard for the particular form of the consumer safeguards. This lack of specificity with regard to form sharply contrasts with the Simplification Act and undercuts the notion that specificity was a statutory object or compliance requirement.

Congress' lack of specificity further reflects the fact that the Preemption Act was designed to encourage affordable housing nationwide and not to reform particular industry practices. No findings or statements in the legislative record address any particular industry abuses. Section 501(c) is not phrased as a comprehensive reform measure. Rather, the benefits in question more likely evidence a congressional intent to provide parity for persons engaged in all types of residential mortgage finance transactions.

Where Congress was specific was in its limitations as to the nature of the federal preemption embodied in the Preemption Act. First, it stated that "(the) provisions of the constitution or the laws of any state expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged,

taken, received or reserved shall not apply to any loan, mortgage, credit sale or advance" which falls within a prescribed statutory definition.[6] Second, it premised preemption on the express condition that the states could opt out of the preemptive framework, thereby striking a balance between state and federal government.[7]

Again, the federal intention is clear. A federal preemption impacting state law only with respect to the rate of return on certain loans or credit sales, and which can be overridden at the state's discretion, evidences no particular consumer protection concern.

In sum, Congress neither intended nor enacted a federal scheme of consumer protections or intended to remedy particular industry practices when it passed the Preemption Act.

B. The Court Of Appeals Determination That Consumer Protection Was The "Price" Of Rate Relief Was In Error

Neither the legislative history nor the content of the Preemption Act evidences a dominant consumer protection purpose. No comprehensive scheme of consumer rights is expressed. No technical precision in consumer disclosure is required. No pattern of industry practice or abuse is described. The states were provided the option of overriding the Preemption Act at their sole discretion.

Yet, the court of appeals decision hinges on a construction that the Preemption Act bartered rate relief in exchange for the provision of consumer protections.

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[6] Sec. 501(a)(1). Pub. L. No. 96-221.

[7] Only 14 states and the territory of Puerto Rico opted out of the usury preemption provisions as of April 1, 1983, the sunset date for doing so. See 5 Fed. Banking L. Rep. (CCH) Paragraph 58,910 and citations contained therein. Georgia opted out of the statute effective March 31, 1983 via H.B. 128.

In fact, the true "price" of rate relief under the Act is the satisfaction of the statutory definitions of a "creditor" who makes "federally related mortgage loans."

The general preemption language of the Act is clear. Section 501(a)(1) provides in essence that preemption will apply to transactions occurring after March 31, 1980, which are secured by a first lien on residential property if the transaction constitutes a "federally related mortgage loan" made by a "creditor" as those terms are defined in section 527(b) of the National Housing Act, as amended by Pub. L. No. 96-399 (October, 1980).[8]

The court of appeals appears to have lost sight of the statutory framework by concluding, in effect, that the "price" of preemption is the provision of consumer protections. Clearly, the "price" is considerably more than that, as a transaction is not either "in" or "out" of the Preemption Act solely on the basis of consumer protection issues.

The "consumer protection" clauses in the Preemption Act surfaced in an eleventh-hour conference committee compromise. This very brief consideration, when viewed in the context of the Preemption Act generally, and when compared to actual federal consumer credit protection law, more clearly reflects a congressional intent to provide buyers of manufactured housing, typically low-to-moderate income families, legal parity with persons entering into conventional residential mortgage arrangements. In short, the manufactured housing provisions were added to the Preemption Act in an effort to stimulate the provision of adequate and affordable housing at all income levels. Further, in recognition that this object could be frustrated if such financing was conducted in

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[8] Sec. 501(a)(1)(A), (B) and (C); Section 527(b) of the NHA is found at 12 U.S.C. Section 1735f-5(b); Cf. Burke, Federal Preemption of State Usury Laws, The Business Lawyer, Vol. 37, p. 750 (1981 ABA Annual Meeting Program).

accordance with something other than standard residential mortgage practices, the so-called "consumer protection" provisions were included.

The House Conference Report underscores the congressional intent to standardize residential mortgage lending practices:

> Manufactured home financing is covered by the mortgage usury preemption as long as such financing complies with consumer protection provisions specified in regulations of the FHLBB. The conferees intend that in developing these regulations the Bank Board should look for guidance to *regulations*, handbooks and circulars *of the FHA and VA* regarding mobile home lending, the provisions of the *standard conventional mortgage forms* of *FHLMC* and *FNMA*, and the provisions of the Uniform Consumer Credit Code. P. 79, Conf. Comm. Rpt. on H.R. 4986, Report No. 96-842, filed March 21, 1980. (emphasis added)

Congress sought to standardize mortgage lending practices in the manufactured housing market by providing for requirements typical to all residential mortgage arrangements, realizing that such financing at that time was generally subject to a scheme of motor vehicle sales finance and Uniform Commercial Code provisions in the various states which contain strict remedial provisions more appropriate to the financing of personal property. Instead, Congress sought to insure that manufactured housing would be treated like any other residential mortgage lending.

The above cited portion of the Conference Committee Report on the Preemption Act refers to the terms contained in the FHA and VA mobile home regulations, standard secondary mortgage market documentation and the U.C.C.C. The FHA and VA regulations to which the Bank Board was referred indicate no particular scheme of consumer protections or disclosures. Typical require-

ments include those covering manufacturers' warranties, site preparation, FHA and VA points and title and lien requirements.[9] Loan limitations, credit eligibility requirements, and maturity provisions are other examples of the concerns addressed in these regulations. They clearly do not constitute a program of particular consumer benefits except to the extent that they inject a modicum of commercial reason and uniformity necessary to the efficient operation of these federal insurance programs.[10]

The emphasis is clear—standard industry practices, as embodied in federally-assisted home financing regulations, conventional financing documentation, and uniform law systems, are to be followed. No particular abuses are highlighted. No particular disclosures are mandated. The Bank Board was provided with little specific guidance and a broad degree of discretion.

To view consumer protection as a principal object of either the manufactured home provisions specifically or the Preemption Act generally, is to misconstrue Congress' real objective. The language of section 501(c) of the Preemption Act, viewed in the context of the legislative history and the other provisions of the statute, merely denotes the congressional desire to promote affordable housing for all by encouraging a standardization of all types of residential mortgage financing.

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[9] See e.g., 38 CFR Section 36.4231, and - Section 36.4235, respectively.

[10] In certain instances, these regulations countenance terms that would seem to be the antithesis of consumer protection. For example, 24 CFR Section 201.565 sanctions a fairly strict acceleration provision as follows:

> Section 201.565 Default Provision.
>
> The obligation shall contain a provision for acceleration of maturity, at the option of the holder, upon default in the payment of any installment upon the due date thereof, or failure to make the payments of rent, taxes, or other charges incurred in connection with the lot or site where the mobile home is emplaced.

In sum, rate relief, even within the context of manufactured housing transactions, was not premised on consumer protection provisions. Accordingly, the court of appeals decision directly conflicts with the congressional act and intent.

II. THE FEDERAL HOME LOAN BANK BOARD HAS STATED IN REGULATIONS, AN OPINION LETTER AND IN BRIEFS SUPPORTING THE PETITIONER HEREIN THAT NO CONTRACTUAL NOTICE OF DEFAULT IS REQUIRED

In discharging its responsibilities under the Act, the Bank Board promulgated a regulation consonant with congressional intent. Like the Act, the regulation did not require that contracts provide notice of a borrower's right to a 30-day notice of default. (12 C.F.R. § 590.4(h)(1))

Having promulgated the regulation, the Bank Board has interpreted it consistently. Its General Counsel, in an opinion letter dated October 28, 1982, stated:

> This requirement refers only to the act of giving notice; neither paragraph (h) nor the Congressional legislation that it implements (Depository Institutions Deregulation and Monetary Control Act of 1980. Pub. L. No. 96-221, § 501, 94 Stat. 161-63 (1980)) expressly requires that a covered credit agreement recite the purchaser-borrower's right to notice. Furthermore, there are no legislative or regulatory history materials suggesting that either Congress or the Board intended an implicit requirement of a contractual notice provision. If a contractual notice provision requirement had been intended, it is reasonable to assume that the Board would have expressly so provided, as it did in paragraphs, (d) (Prepayment with Penalty), (e) (terms of balloon payments), (f) (late charges), and (g) (agreements for deferral of fees) of section 590.4. *In light of these considerations, it is the view of this*

Office that section 590.4(h) does not require that the terms of a manufactured home credit sale agreement recite the purchaser's right to 30 days notice of acceleration or repossession. (emphasis added.) (5 Banking L. Rep. (CCH) ¶ 83-027).

As "chief legal officer" of the Bank Board, the general counsel's duties include "advising the Board with respect to interpretations involving questions of law." (12 C.F.R. 500.17 (1983)).

Proper regard for the role of the Bank Board as Congress' chosen instrument under the Act, and proper regard for the general rule of deference to an agency's construction of its own regulations, as described by this Court in *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), require that controlling weight be given to the Bank Board's views. Where Congress has delegated broad rulemaking power to an agency, deference is especially apt. See e.g., *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

This Court has long held that agency interpretations should be followed by a reviewing court. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450-51 (1978); *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 371 (1973); and *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

Further, this Court has recognized that special deference is appropriate with respect to agency interpretations where reliance interests are likely to have intervened. See *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 87 (1975); *Udall* v. *Tallman (Id.)*. Substantial policy considerations support such special deference, particularly in the area of credit transactions. Creditors must rely upon agency interpretations to comply with various statutes and regulations. Form contracts are drafted in reliance on such interpretations. In this case, literally thousands of manufactured housing credit transactions have been entered into in reliance upon the Bank Board's regulation and interpretation.

More than once this Court has addressed the issue of reliance on opinions of administrative agencies dealing directly with such credit-related issues. In *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980), this Court found that a Federal Reserve Board staff interpretation was entitled to the same respect as an official interpretation, absent the finding that the interpretation was demonstrably irrational.

Far from finding the Bank Board's interpretation demonstrably irrational, the panel below (hereinafter referred to as *Quiller I*) cited *Milhollin* and admitted that "to qualify for federal preemption under the Act the financing agreement need not contain an express term guaranteeing the debtor 30-day notice before repossession or foreclosure." *Quiller, et al.* v. *BarclaysAmerican/Credit, Inc.* 727 F.2d 1067, 1071 (11th Cir. 1984)

Had the court of appeals stopped at that point, *amici* would not now be before this Court.

Instead, the court of appeals held that contractual provisions concerning immediate declarations of default and acceleration are contrary to the rights provided to consumers under the Act. The Bank Board has made a contrary finding. In its brief *amicus curiae* filed before the rehearing *en banc* (hereinafter referred to as *Quiller II*), the Bank Board has stated:

> "Contract language providing for immediate declarations of default and accelleration is not necessarily contrary to the Act and the implementing regulation. Both the Act and the regulation specifically provide for circumstances in which a creditor may in fact act without notice. Overlooked by the Borrowers are the qualifications in the full text of the Act and the regulation. The Act merely requires that the Board issue a regulation that requires a '30-day notice prior to instituting any action leading to repossession or foreclosure (*except in the case of abandonment or other extreme circumstances*)'" 12

U.S.C. § 1735f-7 note (c)(2) (emphasis added in original) (Reprinted in Appendix to Petition for Writ of Certiorari at Page L-13)

The Bank Board brief rightly points out that the Barclays' contract does not claim an unqualified right to foreclosure without notice and was expressly qualified by the borrower's rights to notice and cure. As the Bank Board brief summed up the language, "the contracts do not controvert the protections of the Act." (At Petitioner's Appendix at Page L-14)

The *Quiller II* case is reported at 764 F.2d 1040 (11th Cir. 1985) (*en banc*).

The panel in *Quiller I* then looked to congressional intent to justify its conclusion that the "terms and conditions" relating to the loan agreement did not comply with § 590.4(h). The court found that Congress conditioned federal preemption on the creditor's compliance with consumer protections. Significantly, neither the panel in *Quiller I* nor the court of appeals in *Quiller II* found the Bank Board's interpretation to be demonstrably irrational.

Since *Milhollin* was decided, this Court has restated the view that regulations promulgated by a governmental body responsible for interpreting or administering a statute are entitled to considerable respect, *Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155 (1981). Again, in *Anderson Brothers Ford, et al.* v. *Valencia*, 452 U.S. 205 (1981), this Court found that, absent some obvious repugnance to the statute, an agency's interpretation of its own regulation should be accepted by the court.

The court of appeals did not find that the Bank Board's interpretation was obviously repugnant to the statute. Nor could it, as the interpretation and regulation followed the statute.

The Bank Board filed *amicus curiae* below stoutly defending its regulation and statutory interpretation.

This decision creates a double standard for regulatory agencies regulating financial institutions. Left undisturbed, the practical effect of the court of appeals decision is to create a safe harbor for creditors who follow the regulatory regime of the Board of Governors of the Federal Reserve System while leaving those who follow the precepts of the Bank Board "tossed by the waves of chance."

CONCLUSION

The manufactured housing finance community and its congressionally-designated regulatory agency face a dilemma. The court of appeals decision directly contradicts congressional intent, thwarts national housing policies, and jeopardizes the hithertofore justified reliance by credit grantors on the interpretations of regulatory agencies. In an era of form contracts made by interstate credit grantors, such reliance is not merely desirable, it is essential.

The Petition for Writ of Certiorari should be granted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC.,
Petitioner,

v.

ARTHUR QUILLER, LILLIE MAE QUILLER, and
All Other Persons Similarly Situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BarclaysAmerican/Credit, Inc. [hereinafter "BarclaysAmerican"], the Petitioner herein, respectfully prays that this Court reject the arguments presented by the Quillers in their Brief In Opposition To Petition For Writ Of Certiorari and that a Writ Of Certiorari issue to review the July 8, 1985, *en banc* judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

I. Introduction

In this reply, BarclaysAmerican will address three arguments raised by the Quillers which were not *per se* addressed in BarclaysAmerican's Petition For Writ Of Certiorari.

II. The Views Of The Federal Home Loan Bank Board And Its General Counsel Are Entitled To Great Deference.

A major thrust of the Quillers' Brief In Opposition is their attempt to diminish the authority of the opinion letter issued by the Federal Home Loan Bank Board's [hereinafter "FHLBB" or the "Board"] General Counsel, Thomas P. Vartanian, on October 28, 1982, 5 Fed. Banking L. Rep. (CCH) ¶83,027 (1983) [hereinafter "the Vartanian Letter"] (Appendix J[1]). They seek to do this in three ways: first, by making a vicious and unprecedented attack upon the office of the General Counsel of the FHLBB, alleging that the General Counsel's office "has not been an impartial agency issuing interpretations of its regulations, but has been an advocate of certain mobile home finance companies, issuing *post hoc* rationalizations," Brief In Opposition To Petition For Writ Of Certiorari, p. 7, n. 3; secondly, by characterizing the Vartanian Letter as an "unofficial opinion" which, they argue, because of its "unofficial status" is not entitled to any deference by this Court; and, finally, by referring to the Vartanian Letter as a "*post hoc* rationalization" of the meaning of the regulation. The first of those contentions is scarcely worthy of comment, except perhaps the observation that the First Amendment to the Constitution guarantees all citizens the right to go to the government and express views and make requests of the government, and there is nothing improper in that. U.S. Const. amend. I. Furthermore, it is presumed that government agencies act with propriety, including, as in this instance, expressing *honest* opinions when opinions are expressed. Certainly nothing in the record of this case gives any indication to the contrary with regard to the Vartanian Letter. The other two contentions are discussed *seriatim* below.

---

1. The Appendix to the Petition For Writ Of Certiorari was filed as a separate document. Citations to portions of a particular appendix will be as follows: "App. ___ at ___."

The Quillers point out that there was no specific delegation of authority from the FHLBB to the General Counsel to issue "interpretations" pursuant to § 501(f) of DIDMCA. However, 12 C.F.R. § 500.17 describes the authority of the FHLBB's General Counsel as follows:

> The General Counsel is the chief legal officer of the Board and has, among other functions, those set forth below. He is responsible for the representation of the Board and the Federal Savings And Loan Insurance Corporation in judicial proceedings in which the Board or the Corporation is involved as a party or as amicus curiae. . . . *He is responsible for advising the Board with respect to interpretations involving questions of law*, for the preparation of legislation submitted by the Board to Congress, for the preparation of Board comments to Congress upon pending legislation, *and for the preparation of regulations*. . . .
>
> (Emphasis added).

The General Counsel possesses broad authority under the FHLBB regulations, particularly in legal matters. The construction of the language of a regulation promulgated by the FHLBB is peculiarly within the ambit of the General Counsel's authority, especially in view of the General Counsel's participation in the drafting of regulations.

The Quillers attempt to distinguish *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980) [hereinafter "*Milhollin*"], from the case *sub judice* on the basis that "Congress conferred special status upon official staff interpretations" of the Federal Reserve Board [hereinafter "FRB"] under the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* Brief In Opposition To Petition For Writ Of Certiorari, p. 16. In *Milhollin*, this Court held "that the Court of Appeals erred in rejecting the views of the Federal Reserve Board and staff," 444 U.S. at 570, as expressed in an Official Staff Interpretation and three unofficial Public Information Letters, stating that "[u]nless demonstrably irrational, Federal

Reserve Board staff opinions construing the act or regulations should be dispositive. . . ." 444 U.S. at 565.

It is important to note that, in *Milhollin*, the levels of the FRB's interpretative authority (*e.g.*, "official," "unofficial," etc.) designated by 15 U.S.C. § 1640(f) were not dispositive of the issue in that case. 444 U.S. at 566, n.9. Rather, the issue in *Milhollin*, as in this case, was whether the lower court, in deciding what Regulation Z actually meant, had failed to give appropriate deference to the FRB's interpretation of its own regulations. As the discussion below will demonstrate, in a non-reliance case, an agency's own interpretation of the statute it administers and the regulations promulgated thereunder are entitled to great deference in guiding judicial construction, regardless of the source of the interpretation within the agency.

The rule that agency interpretations are entitled to "great deference" by the courts has been applied to opinions of the General Counsel of the FHLBB. In *Michaels v. Federal Savings and Loan Insurance Corp.*, 413 F.2d 144 (7th Cir. 1979), the issue was whether the triggering date for determining who is an insured under FSLIC insurance was the date a defaulting savings and loan association was taken into custody by state officials, as the plaintiff contended, or the date default was formally declared, as the FSLIC contended. Plaintiff's husband died between the two dates, and she became sole owner of the couple's joint and separate accounts. The court held that Mrs. Michaels could recover the insurance only for herself, but not for her husband, because the identity of the insureds is determined as of the date of default, 413 F.2d at 146, explaining that this

> interpretation is in conformity with that of the defendant agency, which is charged with the administration of the National Housing Act. . . . The position that the default date determines the status of an insured account was taken by the FSLIC as early as March, 1937, see 3 Fed. Home Loan Bank Review 187 (1936-1937), and has been repeated in later opinions of the General Counsel of the Federal Home Loan Bank Board (the

> operating head of the defendant). The uniformity of this position, along with the lack of judicial interpretation of the relevant sections of the Act, is entitled to "great deference" in our statutory interpretation. See *Udall v. Tallman*, 380 U.S. 1, 16 . . . (1965).
>
> 413 F.2d at 147 (footnote omitted).

The *Michaels* court recognized, without discussion, the authority of the FHLBB's General Counsel to issue opinions with regard to matters under the auspices of the FHLBB.

It is significant that the *Michaels* court relied on the leading case of *Udall v. Tallman* as authority for the deference rule. In *Udall*, this Court stated:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. . . . *When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.*
>
> 380 U.S. at 16 (emphasis added).

This same passage from *Udall* was relied upon by this Court in *Milhollin*, 444 U.S. at 566. Thus, the rule of deference in cases like this is dependent, not upon whether the particular interpretation is the product of a specific grant of authority, but upon the recognition of an agency's expertise which follows from its general authority to administer a specific act and promulgate regulations. Therefore, under *Udall*, the deference rule should be given much broader application than that urged by the Quillers.

Moreover, even under the TILA, which was at issue in *Milhollin*, there is nothing which precludes a court from considering even an advisory opinion of the Federal Reserve Board. For example, in *Gerlach v. Allstate Insurance Co.*, 338 F. Supp. 642 (S.D. Fla. 1972), the plaintiff asserted that the TILA applied to premium payment plans under an insurance policy. The district court dismissed the plaintiff's

complaint, noting that the issue was one of first impression. The court relied on certain "correspondence releases by the Federal Reserve Board. . . published in the CCH Consumer Credit Guide" in distinguishing the premium plan of Allstate from a premium financing situation, noting that the correspondence releases were persuasive, although not binding, authority. 338 F. Supp. at 648.

In summary, even though the Vartanian Letter standing alone may not be equivalent to an "interpretation" of the Board, it would be entitled to deference in view of the FHLBB General Counsel's responsibilities vis-a-vis the Board's regulations. Furthermore, the fact that Mr. Vartanian's views have been adopted by the Board itself clearly makes those views entitled to the "great deference" to be accorded under *Udall*.

The Quillers next argue that the Vartanian Letter is merely a "*post hoc* rationalization," placing great emphasis upon the timing of the Vartanian Letter; however, the sequence of events in this suit arguably enhances, rather than diminishes, the authoritativeness of the Vartanian Letter. The DIDMCA regulations went into effect on July 30, 1980, and the Quiller contract was entered into on June 27, 1981, the Vartanian Letter followed on October 28, 1982, and the Quillers filed suit on March 2, 1983, approximately four months later. Accordingly, the Quillers cannot contend that the Vartanian Letter was the product of political machinations on the part of BarclaysAmerican.

Moreover, this Court has held that the political origins and policy disputes surrounding the promulgation of regulations and agency interpretations are not proper areas of inquiry by the judiciary. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. ___, 104 S. Ct. 2778 (1984). The issue in that case was whether the Environmental Protection Agency's regulatory definition of the statutory term "stationary source" was a reasonable construction. 104 S.Ct. at 2780. This Court held that the Agency's definition of "stationary source" should have been followed by the Court of Appeals. In addition, this Court

found that an agency's interpretation should not be discredited by the fact that the agency may have been influenced by public policy disputes and considerations, stating:

> The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the bubble concept, but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.
>
> * * *
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

104 S. Ct. at 2793 (footnote omitted)(citation omitted).

Accordingly, the arguments raised by the Quillers concerning the political genesis of the Vartanian Letter and the FHLBB *amicus* briefs should be disregarded by this Court.

III. Neither The Vartanian Letter Nor The FHLBB Amicus Curiae Briefs Represent "Post Hoc Rationalizations" By The FHLBB Of Its Position With Regard To 12 C.F.R. § 590.4(h), The FHLBB *Amicus Curiae* Briefs Simply Adopt The Position Of The General Counsel Stated In The Vartanian Letter.

The Quillers attack the FHLBB's *amicus curiae* briefs as "*post hoc* rationalizations. . . obtained *ex parte* in connec-

tion with pending litigation [which] are inconsistent with [DIDMCA]." Brief In Opposition To Petition For Writ Of Certiorari, p. 15-16. However, the two cases cited by the Quillers as establishing grounds for such criticism are completely inapposite to the case *sub judice*. In *Bread Political Action Committee v. Federal Election Committee*, 455 U.S. 577 (1982), this Court had under consideration the construction of 2 U.S.C. § 437h(a), which controlled standing to sue under the Federal Election Campaign Act [hereinafter "FECA"]. The parties seeking to assert a claim under the FECA submitted the post-litigation affidavit of Senator James Buckley, who had prepared the original draft of the statute, in an effort to substantiate their interpretation of the scant legislative history of the FECA concerning standing. This Court stated that it could not

> give probative weight to the affidavit because "[s]uch statements 'represent only the personal views of th[is] legislato[r], since the statements were [made] after passage of the Act,' . . . "*[p]ost hoc* observations by a single member of Congress carry little if any weight."
>
> 455 U.S. at 582, n. 3 (citations omitted).

In contrast to this case, the *Bread Political Action Committee* case did not involve a regulation or an interpretation by the Federal Election Commission or any other agency, but involved an interpretation of the statute itself. The parties seeking standing in the *Bread Political Action Committee* case submitted the affidavit of Senator Buckley for the purpose of *clarifying and explaining* an act of Congress. That is totally different from an agency opinion issued in accordance with a regulatory scheme established by a statute which actually contemplates an ongoing interpretative process by the agency. In this case, the Vartanian Letter was issued by the General Counsel of the agency charged by Congress with administering DIDMCA and promulgating regulations thereunder. The FHLBB's *amicus curiae* briefs simply *adopt* the views expressed in the Var-

tanian Letter, which is directly on point to the issue in this case.

The second case cited in support of the Quillers' *post hoc* rationalization argument, *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980) is also inapposite to this case. In the *GTE Sylvania, Inc.* case, this Court was again presented with a question of statutory (not regulatory) construction. Pursuant to a Freedom Of Information Act [hereinafter "FOIA"] request, the Consumer Product Safety Commission [hereinafter "CPSC"] released certain information concerning various accident reports, some of which were labelled confidential by the manufacturers, without first following the procedures under the Consumer Product Safety Act [hereinafter "CPSA"] of notification to the relevant manufacturers. This Court found that the CPSA and the FOIA, read together, required that the CPSA notification procedures must be followed prior to release of information pursuant to a FOIA request. In so holding, this Court rejected a CPSC administrative interpretation of the CPSA issued *after* the CPSC had released the information involved in that case and *after* the manufacturers had filed their actions. This Court also rejected legislative commentary made after the passage of the CPSA. Again, the courts apply a different rule where the question involves construction of an act of Congress, as in the *G.T.E. Sylvania, Inc.* case, than where the construction of an agency's own regulation is at issue, as in this case.

IV. A Statutorily Required Action, Such As The Giving Of A 30-day Notice By The Creditor Prior To Foreclosure, Does Not Have To Be Expressly Contained In The Sales Contract In Order For The Debtor To Acquire An Enforceable Right To Receive The 30-Day Notice.

The Quillers, in perhaps their most startling statement in this litigation to date, again argue, as they did in their Cross-Petition For Writ Of Certiorari, that, under general

maxims of contract construction, the absence from a contract of a provision specifying that the 30-day notice required by 12 C.F.R. § 590.4(h) be given would result in the debtor's having no enforceable right to the notice because only express requirements of the contract are enforceable. This argument, if adopted by this Court, would represent a radical departure from traditional American jurisprudence on this subject, and is dealt with by BarclaysAmerican in its Brief In Response To Cross-Petition For Writ of Certiorari at Section II, and BarclaysAmerican simply incorporates that discussion herein.

V. Conclusion

In conclusion, BarclaysAmerican respectfully prays that this Court grant its Petition For Writ Of Certiorari.

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Dated: November 27, 1985

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GENERAL ELECTRIC CREDIT CORPORATION

ARTHUR QUILLER, ET AL., PETITIONERS

v.

BARCLAYSAMERICAN/CREDIT, INC.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

A provision of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 501, 94 Stat. 161-163, 12 U.S.C. 1735f-7 note, preempts the application of state usury laws to loans secured by first liens on residences, including mobile homes. With respect to mobile home loans, the preemption provision applies only to loans that "comply with [the] consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board" (§ 501(c)), which provide, inter alia, that the lender may take no action to exercise certain remedies upon a default without giving the borrower 30 days' notice and opportunity to cure. The court of appeals ruled that the loan contract in Nos. 85-541 and 85-717 contained language inconsistent with the borrower's rights under this provision and that preemption was therefore inapplicable and the Georgia usury law was applicable to this loan. The question presented is:

> Whether the court of appeals misread the Act and the Bank Board's regulations when it concluded that federal preemption of state usury laws is inapplicable to a loan contract that contains language inconsistent with the borrower's federal law right to notice and opportunity to cure defaults.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-541

BARCLAYSAMERICAN/CREDIT, INC., PETITIONER

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No. 85-584

JACK GRANT, JR., ET AL., PETITIONERS

v.

GENERAL ELECTRIC CREDIT CORPORATION

No. 85-717

ARTHUR QUILLER, ET AL., PETITIONERS

v.

BARCLAYSAMERICAN/CREDIT, INC.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), Pub. L. No. 96-221, § 501, 94 Stat. 161-163, 12 U.S.C. 1735f-7 note, was designed to attack two primary causes of a severe shortage of mortgage credit. DIDMCA provided for

phased removal of federal interest rate restrictions on deposits in federally insured financial institutions, permitting such institutions to offer competitive rates and thereby enhance the resources available for mortgage loans. See S. Rep. 96-368, 96th Cong., 2d Sess. 3-4 (1979). DIDMCA also provided for preemption of state usury limits on residential mortgage loans, permitting such institutions to charge sufficient rates to induce mortgage lending under then-prevailing conditions. § 501(a)(1), 94 Stat. 161; see S. Rep. 96-368, *supra*, at 19.[1]

Under Section 501(c) of DIDMCA (94 Stat. 162) federal preemption of state usury laws with respect to loans secured by "residential manufactured homes" (primarily mobile homes) is conditioned on compliance with certain borrower-protection requirements promulgated by the Federal Home Loan Bank Board (Bank Board):

> The provisions of subsection (a)(1) [the preemption section] shall not apply to a loan, mortgage, credit sale, or advance which is secured by a first lien on a residential manufactured home unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with [the] consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board. Such regulations shall—
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> (1) include consumer protection provisions with respect to balloon payments, prepayment penalties, late charges, and deferral fees;

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[1] Section 501(a)(1)(C)(iii) and (vi) (94 Stat. 161) adopts, with appropriate modification, the definitions of "federally related mortgage loan" and "lender" contained in Section 527(b) of the National Housing Act, 12 U.S.C. 1735f-5(b). Thus, DIDMCA's preemption extends to loans made by institutions regulated or insured by an agency of the federal government, or by any creditor, as defined in 15 U.S.C. 1602(f), "who makes or invests in residential real estate loans aggregating more than $1,000,000 per year." 12 U.S.C. 1735f-5(b)(2)(A) and (D). See 12 C.F.R. 590.2.

(2) require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances);

(3) require that upon prepayment in full, the debtor shall be entitled to a refund of the unearned portion of the precomputed finance charge * * *; and

(4) include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required.

2. Pursuant to Section 501(c) (94 Stat. 162), the Bank Board issued regulations (codified at 12 C.F.R. 590.4) governing mortgage loans secured by manufactured housing where the lender charges an interest rate that exceeds the state usury limit. As required by Section 501(c)(1) (94 Stat. 163) the regulations require that each loan contract contain certain provisions with respect to balloon payments, prepayment penalties, late charges, and deferral fees (12 C.F.R. 590.4(d), (e), (f) and (g), respectively). As required by Section 501(c)(2) (94 Stat. 163) the regulations also provide that, subject to certain exceptions, the creditor may not exercise certain remedies in the event of default unless it has given the borrower 30 days' notice (12 C.F.R. 590.4(h)(1)):

Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against any debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. Such notice shall be sent by registered or certified mail with return receipt requested. In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days

> of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as described above. The debtor is not entitled to notice of default more than twice in any one-year period.

The regulations do not require this provision to be recited in the loan contract.

3. The two cases that are the subjects of the three petitions before this Court arose from the purchase of two mobile homes in Georgia.

Nos. 85-541 and 85-717: Arthur and Lillie Mae Quiller, residents of South Carolina, purchased a mobile home in Georgia in June 1981. The price was $19,754.80 (Pet. App.11).[2] They made a cash down payment of $4,193.80 and financed the balance of $15,561 at an annual interest rate of 18.5% (*ibid.*).[3] The loan agreement is printed on a single sheet of paper labeled "(Mobile Home Only) FEDERAL PREEMPTION CONTRACT." The front of the contract, which contains the signatures and the terms specific to the transaction, recites the disclosures required by the Board's regulations. The front of the contract also contains the following language with respect to defaults (Pet. App. 12 (emphasis added)):

> DELINQUENCY CHARGE. If an installment is in default 15 days or more, the Holder may charge and collect a delinquency charge not to exceed 5% of the installment or $5, whichever is less. Upon such delinquency, Holder may, *subject to any notice of right to*

[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 85-541.

[3] Total finance charges over the fifteen-year contract life were $31,417.40, or $7,417.40 more than would have been permitted (in the absence of federal preemption) under Georgia's statutory 10% usury limit (Pet. App. 11; 85-541 Br. in Opp. 3).

> *cure*, accelerate the unpaid balance of the contract, in which event the unpaid balance, less the rebate of * * * any unearned insurance premiums included in this transaction, is due and payable. In connection with such delinquency, acceleration, or any repossession, Holder may collect reasonable attorney's fees (15% if not prohibited by law), if referred to an attorney not a salaried employee of Holder, and court costs.

The back of the contract contains several standardized terms, including the following (Pet. App. 13 (emphasis added)):

> Time is of the essence. Holder may collect a delinquency and collection charge on each installment in default for 15 days or more in an amount not exceeding 5% of each said installment or $5, whichever is less. If Customer defaults on any obligation under this contract, or if Holder shall consider the indebtedness or the Collateral insecure, the full balance may, upon election of Holder, *without notice, subject to any notice of right to cure*, become due and payable, less the required rebate of the Finance Charge, and rebate of any unearned insurance premiums included in this transaction, together with reasonable attorney's fees (15% if not prohibited by law) if this contract is referred for collection to an attorney, plus court costs.

No. 85-584: Jack and Evelyn Grant, residents of Georgia, purchased a mobile home in Georgia on February 23, 1982 (R. 10).[4] The price was $29,100. They made a cash down payment of $4,300 and financed the balance of $24,800 at an annual interest rate of 20.12%

[4] "R." refers to the district court record in No. 85-584.

(*ibid.*).[5] The contract contained the following provision with respect to late payments (*ibid.* (emphasis added)):

> In addition to the regular installment, Buyer agrees to pay as a delinquency and collection charge on each installment in default for more than 15 days, 5% of the unpaid amount of such installment, or $5, whichever is less. In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the *FINANCE CHARGE* designated as the Time Price Differential calculated by Pro-Rata Method *provided that Buyer shall be given notice of right to cure default* before Seller is permitted to exercise that right.

4. Each couple filed suit against its lender, claiming that the interest rate in its contract exceeded the Georgia usury limit of 10%. Both couples alleged that the state-imposed interest cap was not preempted by DIDMCA because, in the words of the Quiller complaint, the contracts failed to "specifically provide for * * * thirty (30)-day notice [prior to instituting any action leading to repossession or foreclosure]" (Pet. App. M3; see R. 5-7). Both couples sought declaratory judgments barring the lenders from collecting any finance charges. In addition, the Quillers sought penalties of $62,834.80 and the Grants sought $115,092.00 (double the total finance charges) for "willful" violations of state law. Each case was filed as a class action on behalf of persons who had financed purchases of mobile homes with the defendant in Georgia at a rate exceeding the state's usury limit and whose contracts

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[5] Total finance charges over the fifteen-year contract life were $57,546, or $9,996.99 more than would have been permitted under the Georgia statute in the absence of federal preemption (see 85-584 Pet. 3; R. 10).

"did not specify that the purchasers were entitled to a thirty (30)-day notice prior to instituting any action leading to repossession or foreclosure" (Pet. App. M2; see R. 3-4).

5. The United States District Court for the Southern District of Georgia granted motions to dismiss both complaints for failure to state a claim.[6] Separate appeals in the two cases were heard by the same panel of the United States Court of Appeals for the Eleventh Circuit. A divided panel reversed in both cases.

All members of the panel agreed that neither the statute nor the regulations required that the borrower's federal right to notice be recited in the contract (Pet. App. B5-B7). However, the majority concluded in *Quiller* that if a contract does contain language that "permits the creditor to repossess or foreclose * * * upon default," then DIDMCA is violated and "the creditor cannot claim the benefits of * * * preemption" (*id.* at B7). The majority examined the Quiller contract "through the eyes of the typical consumer" (*ibid.*) and held that certain language on the back of the contract[7] (" 'without notice, subject to any notice of right to cure' ") was contrary to the statute and regulations because it "would, at most, inform the debtor that he *may* have a right to cure, but the law guarantees him an *absolute* right to cure" (*id.* at B8 (emphasis in original)). The court held that therefore the terms and conditions of the loan did not comply with the federal requirements and the loan was not entitled to preemption.

In *Grant*, the same divided panel found that the contractual language at issue in that case (stating that the lenders may declare all installments "immediately" due

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[6] The *Quiller* case was originally filed in state court and was removed to federal court by the defendant. The *Grant* case was filed initially in the federal court as a diversity action.

[7] The court did not mention the language on the front of the contract, *i.e.*, "subject to any notice of right to cure."

and payable " 'provided that Buyer shall be given notice of right to cure default' ") was "directly contrary" to the Act and the Board's regulations (Pet. App. E3 (citation omitted)). Accordingly, as in *Quiller*, the panel reversed the district court's judgment on the pleadings.

6. Both cases were then reheard en banc. By a vote of six to five, the court reinstated without change the panel opinion in *Quiller*, which found a violation of the statute. But in *Grant* the court split eight to three the other way, finding no violation. The majority opinion in *Grant* explained the different results in the two cases by noting that the Grant contract "expressly condition[s]" the right to accelerate upon default "in clear, mandatory terms upon the debtor's receipt of notice of right to cure" (Pet. App. D9). Although, as the court acknowledged, the length of the grace period was not stated in the contract, the majority concluded that the Grant contractual language was "not clearly contrary to the requirements of the statute and regulations" (Pet. App. D2, D4).

Both decisions evoked strong dissents. In *Quiller*, the dissenting judges stated that the contract did not conflict with the Act or the regulations since the right to notice is not "absolute." The dissenting judges also suggested that if the contract misstated the federal requirement "a more equitable remedy might be to invalidate the provisions contrary to federal law and enjoin enforcement of such provisions if necessary to protect the consumer" (Pet. App. A6). In *Grant*, the dissenting judges on the en banc court would have found a violation even though the contract was "not as vague or equivocal as the qualifying clause in the *Quiller* contract" (Pet. App. D11).

DISCUSSION

The court of appeals has misconstrued Section 501(c)(2) of DIDMCA and 12 C.F.R. 590.4(h)(1). Section 501(c)(2) directs the Bank Board to adopt a regulation requiring

creditors to give 30 days' notice under certain circumstances. The Bank Board obeyed this direction: 12 C.F.R 590.4(h)(1) provides that, with certain exceptions, a creditor may not exercise certain remedies under a loan contract enjoying federal preemption unless it has given the borrower 30 days' notice. This regulation is self-enforcing: it does not require that the borrower's federal right to notice be set forth in the contract, and any language in the contract that is inconsistent with the borrower's federal right to notice is invalid and unenforceable. Congress and the Bank Board did not intend, nor is it logical, that such inconsistent language should result in loss of preemption.

The holdings in these cases erroneously cast doubt on the validity of a large amount of manufactured housing credit extended under DIDMCA. The impact will be felt by lender institutions and other present holders of such credit, many of which are federally insured. Moreover, because the doubt is one that cannot be resolved on the face of the instruments but would require judicial construction of each allegedly inconsistent phrase, the approach taken below will introduce unnecessary confusion into the secondary markets for such loans. Accordingly, and although the potential economic impact of these decisions cannot be quantified with precision, we believe that review by this Court is warranted.

1. Congress enacted DIDMCA to remedy the severe shortage of mortgage credit that had resulted from rising interest rates. See. S. Rep. 96-368, *supra*, at 3-4. One of the problems was that depository institutions were inhibited from making mortgage loans in states whose usury laws prevented them from charging a market rate of interest. Congress concluded that a statutory "modification in state usury laws will enhance the stability and viability of our Nation's financial system and is needed to facilitate a national housing policy and the functioning of a national

secondary market in mortgage lending." S. Rep. 96-368, *supra*, at 19.[8] As the Senate report explained (*ibid.*):

> Federal preemption of State usury ceilings would not only promote national home financing objectives but would provide the resources with which savers could be paid more interest on their savings accounts.

Section 501(c) of DIDMCA provides that the preemption provision shall not apply to a loan unless its terms and conditions "comply with consumer protection provisions [to be] specified in regulations" of the Bank Board. The statute contemplates regulations of two types: regulations requiring certain provisions to be set forth in each contract and regulations imposing self-enforcing requirements and prohibitions. Neither type of regulation would create any doubt about the validity of a loan contract that could not be resolved by examining the face of the contract.[9]

Section 501(c)(2) permits the Bank Board to adopt a regulation with respect to notice that is of the self-enforcing type: it provides that the regulations shall "re-

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[8] As a practical matter, prior to DIDMCA borrowers like the plaintiffs found it difficult or impossible to obtain any home financing. See, S. Rep. 96-368, *supra*, at 19; see also 6A A. Corbin, *Corbin on Contracts* § 1498, at 678 (1962) (usury laws "deprive those whose credit is weakest of the opportunity to borrow at all").

For this reason, the court of appeals erred in viewing expanded consumer protection measures as the "price" lenders must pay for the right to charge higher interest rates (Pet. App. B9). The new right of lenders to charge market interest rates benefited both lenders and borrowers by making credit available.

[9] This was important to Congress, which did not want the consumer protection provisions to defeat the primary purpose of making credit more readily available. For example, the conference report states, "before exercising this authority [to prescribe additional protections], the Board should carefully * * * study the implications of each additional requirement, including consideration of the economic impact on creditors and consumers of each requirement." H.R. Conf. Rep. 96-842, 96th Cong., 2d Sess. 79-80 (1980).

quire a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances)." Accordingly, 12 C.F.R. 590.4(h)(1) is a self-enforcing prohibition against acceleration or foreclosure without 30 days' notice except under specified circumstances. The regulation does not require that the right to notice be set forth in the loan contract,[10] and the Board has consistently adhered to the view that the regulation does not require manufactured housing loan agreements to include a provision for 30 days' notice in the event of default. See Pet. App. J1-J2 (opinion of Bank Board's general counsel); *id.* at K1-K8, L1-L9 (Bank Board amicus curiae briefs in court of appeals).

2. The court of appeals recognized that the right to notice need not be set forth in the loan contract (Pet. App. B5 (emphasis in original)):

> The plain language of the regulation prohibits only the *act* of foreclosure or repossession without giving notice. The words "no action . . . may be taken" regulate the conduct of creditors attempting to exercise their rights upon default, not the written financing agreements themselves.

But the court then ruled that if the contract does contain remedies language that a court finds contrary to the borrower's federal right to notice, preemption is lost. The court apparently assumed that the loan contract could "authoriz[e] conduct contrary to" federal law. Pet. App. B7 (emphasis omitted). On that assumption, the court examined the language in each contract to see whether it

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[10] By contrast, the regulations do require certain consumer protection provisions to be set forth in the loan contract. See 12 C.F.R. 590.4(d), (e), (f) and (g). Any failure to comply with these disclosure rules is discernible on the face of the contract and results in loss of preemption.

"authorized" contrary conduct. It concluded that the loan contract in *Quiller* gave the lender rights contrary to the regulations, defeating preemption.

The court of appeals apparently failed to recognize that the Act and the regulations set forth a federal 30-day notice requirement that the lender and borrower have no power to nullify. Obligations "imposed by law, as necessary to the public interests, * * * could not be dispensed with by the agreement of the parties." *Chicago, St. L. & N.O.R.R.* v. *Pullman Southern Car Co.*, 139 U.S. 79, 90 (1891). See *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 19 n.17 (1977); *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, 692 (1897). Any misstatement in a loan contract is simply unenforceable. As this Court recently stated in *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986), slip op. 12, "[i]f the regulatory statute is otherwise within the powers of Congress * * *, its application may not be defeated by private contractual provisions."

Accordingly, if the loan contract in *Quiller* misstated the borrower's right to notice,[11] the misstatement did not reduce the borrower's rights that arise by force of the regulation if the lender has elected to preempt state usury law. Preemption is not, in this respect, dependent on the language of the contract, and an arguable misstatement of a right the borrowers might have under certain circumstances in the future did not entitle the borrowers to

[11] The court of appeals' conclusion that the Quiller contract purported to authorize conduct contrary to federal law is itself highly questionable. That conclusion was based on the contract's departure from what the court perceived as the statute's "*absolute* right to cure" (Pet. App. B8 (emphasis in original)). As the Bank Board advised the court (Pet. App. E14), however, the notice requirement is not absolute. The Act and the regulations expressly contemplate situations in which notice need not precede the remedies for default (*i.e.*, abandonment, extreme circumstances, or the third default within a year).

the windfall of a reinstatement of the usury statute after they had received the loan they bargained for and the protection of the federal notice requirement.[12]

3. The court of appeals' ruling casts doubt on the enforceability of a large quantity of outstanding manufactured housing loans. Moreover, such doubts cannot be resolved by examining the face of the contracts but will require an assessment in each instance of the risk that a court will later find language in the contract inconsistent with the notice requirement of the federal regulation. (This assessment may, as illustrated by the range of views below, be difficult to make.) The court of appeals' approach would therefore tend to reduce the marketability of all such loans, contrary to the central purpose of DIDMCA to encourage a flow of capital into home loans.

While few loans at rates in excess of state usury limits are being written today, there is a large number of outstanding loans that this en banc decision wrongly places under a cloud. In 1985, the amount of outstanding credit extended for mobile home purchases stood at almost $26 billion. *Domestic Financial Statistics*, 72 Fed. Res. Bull. A40 (1986). Part of that sum is attributable to loans not dependent on federal preemption: loans that preceded DIDMCA; loans made in the 14 states that had no usury

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[12] The brief in opposition in No. 85-541 makes several references (at 5-6, 9-11) to conduct that, respondents contend, would divest the lender of the protections of federal preemption without regard to the contractual language. The complaint makes no such claim, however, and is directed exclusively to the language of the loan agreement. Accordingly, respondents' contentions of unlawful conduct have no bearing on the issue before this Court. The district court proceedings in this case terminated when the lender's motion to dismiss the complaint for failure to state a claim was granted. In that posture, only the allegations of the complaint (*i.e.*, the contract's purported shortcomings in disclosure) are considered. The court of appeals therefore did not comment on the conduct allegations and they are not properly before this Court.

limits or had limits higher than market rates;[13] and loans made recently at lower interest rates. In addition, between 1980 and 1983 fifteen states implemented DIDMCA's provision for opting out of the federal usury preemption and returning to state-imposed usury standards.[14] In those states, therefore, DIDMCA provided the basis for lending only until the effective date of each state's override legislation. In addition, eight other states have eliminated usury limits for some or all manufactured home loans.[15] Some

[13] *Mobile Home Usury Preemptions: Hearing Before the Subcomm. on Financial Institutions and Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 99th Cong., 1st Sess. 220 (1985).

[14] Under DIDMCA § 501(a)(2) (94 Stat. 162) states were given the opportunity, until April 1, 1983, to override the preemptive provisions of the Act. The following states did so (the effective dates of the override laws are noted in parentheses): Colo. Rev. Stat. § 5-13-105 (Supp. 1985) (July 1, 1981); Ga. Code Ann. § 7-4-20 (Supp. 1985) (Mar. 31, 1983); Hawaii Rev. Stat. § 478-12 (Supp. 1984) (May 30, 1980); Idaho Code § 28-49-105 (Supp. 1985) (Mar. 31, 1983); 1980 Iowa Acts ch. 1156, § 32 (May 9, 1980); Kan. Stat. Ann. § 16-207a (1981) (May 17, 1980); Me. Rev. Stat. Ann. tit. 9-A, § 1-110 (Supp. 1985) (May 18, 1983); 1981 Mass. Acts ch. 231, § 2 (Sept. 2, 1981); Minn. Stat. Ann. § 47.203 (West Supp. 1986) (June 2, 1981); 1982 Neb. Laws L.B. 623 (July 17, 1982); 1981 Nev. Stat. ch. 668, § 11 (June 14, 1981); N.C. Gen. Stat. § 24-2.3 (Supp. 1985) (Mar. 31, 1983); 1981 S.C. Acts No. 6 (Mar. 2, 1981); 1982 S.C. Acts No. 385; S.D. Codified Laws Ann. § 54-3-15 (Supp. 1984) (Mar. 5, 1981); 1981 Wis. Laws ch. 45, § 50 (Nov. 1, 1981).

[15] See Ariz. Rev. Stat. Ann. §§ 44-1201(A), 44-6002 (Supp. 1985); Cal. Health & Safety Code § 18039.5 (West 1984); Mont. Code Ann. § 31-1-241(1) (1985); N.H. Rev. Stat. Ann. § 361-A:8 (1984); N.M. Stat. Ann. § 56-8-11.1 (Supp. 1985); Or. Rev. Stat. § 82.010 (1985); Utah Code Ann. §§ 15-1-1, 70C-2-101 (Supp. 1985); Va. Code §§ 6.1-330.37, 6.1-330.21 (1983); *id.* §§ 46.1-515 *et seq.* (1980 & Supp. 1985). In other states, there are no interest limits for certain types of loans, but it is unclear from the statutes whether loans for the purchase of mobile homes fall within those provisions. *E.g.*, Ala. Code § 8-8-5 (1984); Alaska Stat. § 45.45.010(b) (Supp. 1985) (no limit for

of the remaining states adjusted their interest rate ceilings upward to reflect market conditions, so that as a practical matter Section 501 became progressively less significant in stimulating loans.[16] Nevertheless, the Bank Board estimates that of the $26 billion in outstanding credit secured by mobile homes, at least $4 billion is dependent on federal preemption.

The court of appeals' ruling would make the enforceability of these loans not only uncertain but dependent in many instances on judicial construction of language alleged to be inconsistent with the notice regulation. The decision will, in the Bank Board's view, have a direct effect on the secondary market for such mortgage loans (and securities backed thereby).[17] This is a market in which

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loans over $25,000); Conn. Gen. Stat. Ann. § 37-9 (West Supp. 1985) (no limit for loans extended by certain financial institutions); Del. Code Ann. tit. 5, § 2907 (Supp. 1985) (motor vehicle financing); Ill. Ann. Stat. ch. 17, § 6404 (Smith-Hurd Supp. 1985); Ky. Rev. Stat. Ann. § 360.150(2) and (13) (Bobbs-Merrill Supp. 1984); *id.* § 360.010(1)(b); N.J. Stat. Ann. § 17:16C-41 (West 1984); N.Y. Pers. Prop. Law § 404(1) (McKinney Supp. 1986) (retail installment sales); Wyo. Stat. § 40-14-212 (Supp. 1985) (no limit over $25,000); *id.* § 40-14-348 (no limit over $25,000).

[16] Market interest rates are at present below the usury limits in virtually all states; there is, accordingly, no substantial reliance on federal preemption at this time. Market conditions are not static and could of course alter that situation.

[17] Because the court of appeals' decision in *Quiller* is interlocutory, the direct impact of the decision on the parties is unknown. The plaintiffs contend that under the state law in effect at the time the suit was commenced (Ga. Code Ann. §§ 10-1-30 *et seq.* (1982)), the penalty for wilful excessive interest rates was forfeiture of the entire finance charge ($31,417.40) plus twice that amount as a penalty. The Georgia law has since been amended, however. In 1983, Georgia repealed all interest rate limitations on motor vehicle loans, including mobile homes (Ga. Code Ann. §§ 7-4-3, 7-4-5 (Supp. 1985)). Under the new law, violations of disclosure provisions will result in damage awards no smaller than $100 and no greater than $1,000. Recent Georgia Supreme Court decisions strongly suggest that the state would

Congress expressly sought to ensure stability (see S. Rep. 96-368, *supra*, at 19 ("it is the Committee's intent that loans originated under this usury exemption will not be subject to claims of usury even if they are later sold to an investor who is not exempt under this section")). We therefore suggest that, notwithstanding the absence of a conflict among the circuits, this Court should put an early end to the potential dislocation that could be caused by the decision below by reviewing the question whether preemption can be defeated by contract language that does not accurately state the borrower's federal right to notice.[18]

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apply these amendments to the instant case. See *Ward* v. *Hudco Loan Co.*, 254 Ga. 294, 328 S.E.2d 729, 730-731 (1985); *Fountain* v. *Dixie Finance Corp.*, 252 Ga. 543, 314 S.E.2d 906, 907-908 (1984); see *Ehrman* v. *Manning*, 177 Ga. App. 442, 339 S.E.2d 652 (1986). One federal district court decision that precede *Ward*, however, indicates that the matter is not free from doubt. *Doyle* v. *Southern Guaranty Corp.*, No. CV 184-180 (S.D. Ga. Jan. 15, 1985).

The interlocutory posture of the *Quiller* case need not deter this Court's review. The important federal statutory issue has been resolved with finality for purposes of the case. Unless it is reversed, the decision below will control all further proceedings in *Quiller* and will govern the decisions in the related cases currently pending in the Eleventh Circuit (see 85-541 Pet. 8 n.4).

[18] That is the essence of the second question presented in No. 85-541, the only question in the three petitions that merits a grant of certiorari. The first question in No. 85-541 turns on the particular language in the Quiller-Barclays contract and is of little consequence other than to the parties. The same is true of question two in No. 85-584. The remaining questions in Nos. 85-584 and 85-717 would be resolved by a decision in No. 85-541. Accordingly, if certiorari is granted on question two in No. 85-541, the other cases should be held pending this Court's disposition. Should the petition in No. 85-541 be denied, however, then the companion petitions should also be denied.

CONCLUSION

The petition for a writ of certiorari in No. 85-541 should be granted with respect to the second question presented and the petitions in Nos. 85-584 and 85-717 should be disposed of in light of this Court's disposition in No. 85-541.

Respectfully submitted.

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On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 85-541, 85-584 and 85-717

BARCLAYSAMERICAN/CREDIT, INC., *Petitioner,*

v.

ARTHUR QUILLER, *et al.*, *Respondents.*

JACK GRANT, JR., *et al.*, *Petitioners,*

v.

GENERAL ELECTRIC CREDIT CORPORATION, *Respondent.*

ARTHUR QUILLER, *et al.*, *Petitioners,*

v.

BARCLAYSAMERICAN/CREDIT, INC., *Respondent.*

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

I. The Depository Institutions Deregulation And Monetary Control Act Of 1980 Was Not An Absolute Preemption Statute.

The fallacy of the position of the United States that the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) only governs conduct subsequent to the time of a transaction is two-fold: (1) it ignores the language of DIDMCA and (2) it ignores the fact that DIDMCA was not an absolute preemption statute that preempted all state laws governing the finance charges that could be assessed on mobile home credit sale transactions and loan transactions.[1]

For example, let the following be answered: would a lender, which elected not to pay the price for preemption and which did not charge finance charges in excess of applicable state law be subject to a suit

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[1] The United States erroneously refers to the term "usury," a term which relates to the charging of excessive interest on loans. *See Phillips v. Allis-Chalmers Credit Corp.*, 177 Ga.App. 323, 339 S.E.2d 302, 303 (1985). The *Quiller* transaction and the *Grant* transaction, like most mobile home credit transactions, involve a "time-price sale" arranged by dealers who in turn discounted the mobile home contracts to finance companies. Transactions such as this are generally governed by comprehensive state retail installment sales acts. In this case, both the *Quiller* and *Grant* transactions were governed by the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30, et seq. Credit is prearranged between the dealer and finance company and financing is generally tied to the trailer. The financing market is captive as opposed to the financing of conventional homes which are generally financed by loans from third parties. Contrary to the implications made by the United States in Note 17, the rights of the Quillers and Grants under this statute are contractual obligations which cannot be abrogated by subsequent amendments to Georgia statutes.

enjoining conduct inconsistent with DIDMCA and the consumer protection regulations promulgated thereunder when it computed finance charges pursuant to the Rule of 78s, when it assessed late charges after only 10 days, when it immediately and without notice accelerated the payments or when it immediately and without notice repossessed a mobile home or foreclosed a security interest? The answer is absolutely NO!

The United States, on p.11, Note 10, admits that any failure to comply with 12 C.F.R. § 590.4(d)(e)(f) and (g) which is discernable on the face of the contract would result in loss of preemption. Those regulations govern balloon payments, prepayment penalties, late charges and deferral fees. Those regulations were enacted in order to comply with DIDMCA § 501(c)(1). DIDMCA, § 501(c)(2) mandates the notice of default and the right to 30 days in which to cure the default. These are even more important protections. Both these sub sections are exactly coordinate and are, in fact, part of the same sentence of DIDMCA which referred unmistakably to the content or the "terms and conditions" of the credit sale contract. There is not even a whisper in DIDMCA about any "self-enforcing" provisions.

The mobile home finance industry, in urging Congress to enact the mobile home section of DIDMCA, told Congress that credit sales utilizing the "Rule of 78s" and credit sales "failing to incorporate appropriate purchaser protections drawn from the traditional real estate mortgage field" would not be entitled to the preemption of state laws governing

finance charges.[2] The traditional real estate mortgage field has long utilized uniform promissory note forms and mortgage forms that have been approved by the Federal Home Loan Mortgage Corporation (FHLMC) and by the Federal National Mortgage Association (FNMA). These forms that are utilized nationwide contain a contractual right to a notice of default and a contractual right to 30 days in which to cure the default.[3]

Section 501(c) of DIDMCA was consistent with what was requested by the mobile home finance industry; that is, a limited preemption of state laws that only applied to certain "federally related mortgage lenders" who drafted contracts with "terms and conditions" that complied with DIDMCA and the consumer protection regulations enacted by the Federal Home Loan Bank Board (FHLBB). While granting the FHLBB broad discretion in formulating these consumer protection regulations, Congress specifically required that in connection with preemption transactions, mobile home purchasers would have as a "term and condition" of their contract a right to a notice of default and 30 days in which to cure the default prior to repossession or foreclosure (except in cases of abandonment or extreme circumstances), a provision consistent with the contractual provisions

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[2] *Mobile Home Usury Preemptions: Hearing Before the Subcomm. on Financial Institutions and Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, S.Hrg. 99-1382 (hereinafter referred to as 1985 Senate Hearings), p.207-208, testimony presented by Mr. Will Ehrle on behalf of the Coordinating Counsel on Manufactured Housing Finance, February 21, 1980, and appearing in this November, 1985 testimony.

[3] Case No. 85-541, Quiller Appendix N, p.58a.

contained in traditional real estate mortgage documents. DIDMCA § 501(c)(2).

At the time the consumer protection regulations were proposed and adopted, the FHLBB's position was clear that creditors would be entitled to preempt state law only if their contracts were consistent with those regulations. 45 Fed.Reg. 31122 (May 12, 1980); 45 Fed.Reg. 43681 (June 30, 1980). Thus, both Congress and the FHLBB understood at the time of the enactment of DIDMCA and the adoption of the consumer protection regulations that creditors would not be entitled to preempt state laws governing finance charges if consumers were not granted a right to a notice of default and a right to cure that default within 30 days prior to repossession or foreclosure. It was also the obvious intent of both that if the "terms and conditions" of the mobile home contract contained language inconsistent and antagonistic with the requirements of the consumer protection regulations contained at 12 C.F.R. § 590.4, the contract did not preempt state law. Creditors whose contracts did not comply with DIDMCA, § 501(c), and 12 C.F.R. § 590.4 did not lose any preemption; they merely never qualified for it in the first instance.

II. DIDMCA, § 501(c) Requires That In Order For Contracts To Be Entitled To Preemption, Consumers Be Granted A Contractual Right To Notice Of Default And A Contractual Right To Cure That Default Within 30 Days.

While Congress granted broad authority to the FHLBB to promulgate consumer protection regulations, it mandated that consumers be given a notice of default and 30 days in which to cure the default prior to repossession or foreclosure (except in cases

of abandonment or extreme circumstances). DIDMCA, § 501(c)(2). Under the Uniform Commercial Code, a creditor is entitled to peaceably repossess a mobile home immediately and without notice unless the creditor's right is modified by contract. *Ford Motor Credit Company v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978); U.C.C. Art. 9, § 503. The only way the consumer is going to have the right to notice of default and the right to cure that default within 30 days is for that right to exist by virtue of the terms and conditions of the contract. If the contract is silent on the subject, the debtor is subject to U.C.C. Art. 9, § 503.[4]

The United States argues that obligations imposed by law could not be dispensed with by agreement of the parties. However, that argument presupposes that all mobile home credit sale contracts had been preempted by DIDMCA. The only way to determine whether or not a contract is governed by state law

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[4] The United States correctly points out that the Eleventh Circuit Court of Appeals rejected this argument. However, in doing so, the Court relied heavily on the "Vartanian" letter. Between the date of the panel opinion and *en banc* briefing, this letter was exposed for exactly what it was, an unofficial opinion solicited *ex parte* at the request of General Electric Credit Corporation in order to defeat litigation pending in the state courts of Arkansas. No efforts were made to "publish" or "promulgate" this unofficial letter until after the requesting party determined that it was beneficial to it. If letters such as the "Vartanian" letter can determine issues such as those being presented here, then issues such as this will be decided depending upon what party in litigation has the most clout with a particular governmental agency. As the Federal Register does not contain any proposed amendment to the regulations, evidently this process continues. See page 4 of the Supplemental Brief filed by General Electric Credit Corporation in Opposition to Petition.

or whether or not the lender has paid the price for preemption is to review the "terms and conditions" of the contract. Otherwise, creditors do exactly as was done in the *Quiller* case, that is, they argue that the contract is governed by some other statute.[5]

Mobile home contracts such as those used in the *Grant* and *Quiller* cases are typical contracts of adhesion. Purchasers are frequently unaware of complicated rules of contract construction and such contracts should be construed through the eyes of the typical consumer to determine whether or not the finance company used terms and conditions to impose illegal burdens upon the consumer. *See* Rakoff, *Contracts of Adhesion*, 96 Harv.L.R. 1174 (1983).

III. The Eleventh Circuit Court Of Appeals' Ruling In *Quiller* Does Not Cast Doubt On The Enforceability Of Large Quantities Of Outstanding Mobile Home Transactions.

The United States, like certain mobile home finance companies who have appealed to Congress for retroactive pardons, has been unable to offer any specific figures to support its "sky is falling" arguments. However, numerous finance companies and lenders, in drafting their contracts, have paid specific attention to the "price for preemption" and have specifically granted as a term of the contract the right to notice of default and a contractual right to cure that

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[5] The United States argues in fn.12 that based on the language of the complaint, the *in judicio* admissions in the pleadings by BarclaysAmerican, as well as the *in judicio* admissions concerning the conduct of BarclaysAmerican are irrelevant since the district court dismissed this case on a FRCP 12(b)(6) motion. This argument ignores notice pleading under the Federal Rules of Civil Procedure. *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957).

default within 30 days, and have insured that the other terms and provisions were consistent with those consumer protections contained in DIDMCA § 501(c) and in 12 C.F.R. § 590.4.[6] In answering questions posed by the Senate, trade organizations representing BarclaysAmerican produced a copy of the current form contract used by BarclaysAmerican, which specifically grants consumers a contractual right of notice of default and a contractual right to cure that default within 30 days, and which has other terms and conditions which are consistent with DIDMCA and the consumer protection regulations contained at 12 C.F.R. § 590.4.[7] The fact of the matter is that only a few finance companies are known to have charged finance charges in excess of those permitted by state law while not paying the price for preemption. These finance companies, whose contracts are in violation of state law, are subject to the remedies provided by state law and arguments concerning the economic consequences to either party are irrelevant and *de hors* the record.

CONCLUSION

Adherence to the statutory language of DIDMCA demands that the "terms and conditions" of the credit sale contract be considered in determining whether or not state law has been preempted.[8] The United States has ignored this principle for purposes of ex-

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[6] 1985 Senate Hearings, *supra*, p.20, p.51-52, 53-54, 55-56.

[7] *Id.*, p.270-271.

[8] *See Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 474 U.S. ___, 88 L.Ed.2d 691 (1986).

pediency and for perceived economic considerations. A position like that taken by the United States would give credence to the legal philosophy "that the law is no more than a means by which unjust power relations are dressed in the costume of external truths."[9]

The issues in No. 85-584 involve important questions of federal law which have, in part, been emasculated and obscured by unofficial opinions and varying positions of the FHLBB obtained *ex parte* in an effort to support certain arguments contrary to the clear and unambiguous language of DIDMCA. This Court should decide these issues and grant the petition for writ of certiorari in No. 85-584. The petition in No. 85-717 should be granted only if this Court grants the petition in No. 85-541.

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[9] *Time*, Nov. 18, 1985, p.87. *The New York Times*, Oct. 6, 1985, p.58, discussing Critical Legal Studies.

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